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Supreme Court, U.S.
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No. 06-

In The

Supreme Court of the United States

J&G SALES, LTD,

Petitioner

v.

MICHAEL J. SULLIVAN,
ACTING DIRECTOR
BUREAU OF ALCOHOL, TOBACCO,
FIREARMS AND EXPLOSIVES

Respondent

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether a "demand letter" to federally licensed firearms dealers requiring them to provide the agency with information from records maintained by the dealers exceeds the agency's authority under 18 U.S.C. § 923(g)(5)(A) in view of the statutory scheme enacted by Congress.

PARTIES TO THE PROCEEDING

The parties are J&G Sales, Ltd. and Michael J. Sullivan, Acting Director, Bureau of Alcohol, Tobacco, Firearms and Explosives.

TABLE OF CONTENTS

Page

QUESTION PRESENTED i

PARTIES TO THE PROCEEDING ii

TABLE OF AUTHORITIES iv

OPINION BELOW 1

JURISDICTION 1

STATUTES 1

STATEMENT OF THE CASE 4

ARGUMENT 6

THE DECISION OF THE COURT OF APPEALS CONFLICTS WITH THIS COURT'S DECISIONS THAT REGULATORY STATUTES BE INTERPRETED AS A SYMMETRICAL AND COHERENT SCHEME 6

CONCLUSION 23

APPENDIX

Opinion of the United States Court of Appeals for the Ninth Circuit 1a

TABLE OF AUTHORITIES

CASES **Page**

Airports Auth. v. Citizens for Noise Abatement,
501 U.S. 252 (1991) 13

Blaustein & Reich, Inc. v. *Truscott,*
365 F.3d 281 (4th Cir. 2004) 6

Blum v. Stenson,
465 U.S. 886 (1984) 14

Bulova Watch Co. v. United States,
365 U.S. 753 (1961) 21

Christensen v. Harris County,
529 U.S. 576 (2000) 21

Colautti v. Franklin,
439 U.S. 379 (1979) 8, 9

Colonnade Corp. v. United States,
397 U.S. 72 (1970) 11

Davis v. Michigan Dept. of Treasury,
489 U.S. 803 (1989) 7, 9

Duncan v. Walker,
533 U.S. 167 (2001) 8, 9

FDA v. Brown & Williamson Tobacco Corp.,
529 U.S. 120 (2000) 7, 9, 13, 20

K Mart Corp. v. Cartier, Inc.,
486 U.S. 281 (1988) 13

Mastro Plastics Corp. v. Labor Board,
350 U.S. 270 (1956) 7, 9

McCulloch v. Sociedad Nacional,
372 U.S. 10 (1963) 23

National Rifle Ass'n v. Brady,
914 F.2d 475 (4th Cir. 1990),
cert. denied 499 U.S. 959 (1991) 22

Negonsott v. Samuels,
507 U.S. 99 (1993) 13

Philbrook v. Glodgett,
421 U.S. 707 (1975) 7

Robinson v. Shell Oil Co.,
519 U.S. 337(1997) 12

Schwegmann Bros. v. Calvert Corp.,
341 U.S. 384 (1951) 19

United States v. Biswell,
406 U.S. 311 (1972) 11

United States v. Menasche,
348 U.S. 528 (1955) 8, 9

STATUTES

18 U.S.C. § 923(g)(1)(A)(i) ..... *passim*

18 U.S.C. § 923(g)(1)(B) ..... *passim*

18 U.S.C. § 923(g)(3)(A) 3, 12, 15, 20

18 U.S.C. § 923(g)(4) 3, 12, 20

18 U.S.C. § 923(g)(5)(A) ..... *passim*

18 U.S.C. § 923(g)(7) ..... *passim*

18 U.S.C. § 926(a) 16, 17

Firearms Owners' Protection Act,
P.L. 99-308, 100 Stat. 449 (1986) 8, 15, 17

Gun Control Act of 1968,
P.L. 90-618, 82 Stat. 1213 (1968) 14

REGULATIONS

27 C.F.R. § 178.126 14

LEGISLATIVE MATERIALS

S.Rep. 98-583, 98th Cong.,
2d Sess. (1984) 15, 17, 20, 21

Legislation to Modify the 1968
Gun Control Act:
Hearings Before the
Committee on the Judiciary,
House of Representatives,
99th Cong., 1st & 2d Sess. (1986) 20

131 Cong. Rec. 14, 18, 19

132 Cong. Rec. 18

OPINION BELOW

The Opinion of the United States Court of Appeals for the Ninth Circuit reversing the grant of summary judgment to Petitioner is published at 473 F.3d 1043 (9th Cir. 2007) and is printed in the Appendix ("App.") at App. 1a.

JURISDICTION

The United States Court of Appeals for the Ninth Circuit reversed a grant of summary judgment on January 16, 2007. Justice Kennedy extended until June 15, 2007 the time within which to file this petition. This Court has jurisdiction under 28 U.S.C. § 1254(l).

STATUTES

> The Attorney General, when he has reasonable cause to believe a violation of this chapter has occurred and that evidence thereof may be found on such premises, may, upon demonstrating such cause before a Federal magistrate judge and securing from such magistrate judge a warrant authorizing entry, enter during business hours the premises (including places of storage) of any . . . licensed dealer . . . for the purpose of inspecting or examining - (i) any records or documents required to be kept by such . . . dealer . . . under this chapter or rules or regulations under this chapter . . . .

18 U.S.C. § 923(g)(1)(A)(i).

> The Attorney General may inspect or examine the inventory and records of a . . . licensed dealer without such reasonable cause or warrant - (i) in the course of a reasonable inquiry during the course of a criminal investigation of a person or persons other than the licensee; (ii) for ensuring compliance with the record keeping requirements of this chapter - (I) not more than once during any 12-month period; or (II) at any time with respect to records relating to a firearm involved in a criminal investigation that is traced to the licensee; or (iii) when such inspection or examination may be required for determining the disposition of one or more particular firearms in the course of a bona fide criminal investigation.

18 U.S.C. § 923(g)(1)(B).

> Each licensee shall prepare a report of multiple sales or other dispositions whenever the licensee sells or otherwise disposes of, at one time or during any five consecutive business days, two or more pistols, or revolvers, or any combination of pistols and revolvers totalling two or more, to an unlicensed person. The report shall be prepared on a form specified by the Attorney General and forwarded to the office specified thereon and to the department of State police or State law enforcement agency of the State or local law enforcement agency of the local jurisdiction in which the sale or other

> disposition took place, not later than the close of business on the day that the multiple sale or other disposition occurs.

18 U.S.C. § 923(g)(3)(A).

> Where a firearms or ammunition business is discontinued and . . . discontinuance of the business is absolute, such records shall be delivered within thirty days after the business discontinuance to the Attorney General. However, where State law or local ordinance requires the delivery of records to other responsible authority, the Attorney General may arrange for the delivery of such records to such other responsible authority.

18 U.S.C. § 923(g)(4).

> Each licensee shall, when required by letter issued by the Attorney General, and until notified to the contrary in writing by the Attorney General, submit on a form specified by the Attorney General, for periods and at the times specified in such letter, all record information required to be kept by this chapter or such lesser record information as the Attorney General in such letter may specify.

18 U.S.C. § 923(g)(5)(A).

> Each licensee shall respond immediately to, and in no event later than 24 hours after the receipt of, a request by the Attorney General for information contained in the records required to be kept by this chapter as may be required for determining the disposition of 1 or more firearms in the course of a bona fide criminal investigation.

18 U.S.C. § 923(g)(7).

STATEMENT OF THE CASE

On August 4, 2003, the Bureau of Alcohol, Tobacco, Firearms, and Explosives ("ATF") sent J&G Sales, Ltd. ("J&G") a "demand letter," directing J&G to provide the following information regarding secondhand firearm acquisitions: the name of the manufacturer and/or importer; the acquisition date; the model; the caliber or gauge; and the serial number. J&G was directed not to provide either the name of the person from whom the secondhand firearm was acquired or to whom the firearm was transferred. J&G was the recipient of a "demand letter" because there had purportedly been sixteen (16) trace requests to J&G, with a "time-to-crime"[1] of three years or less. The demand letter instructed J&G to submit its report for 2002 secondhand firearms acquisitions to the National Tracing Center within thirty days, and quarterly reports thereafter until it was informed otherwise. Demand letters were also sent to some 450 federally licensed firearms dealers throughout the United States.

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[1] The "time-to-crime" is the time between when a firearm is initially sold and when it is recovered by law enforcement.

On November 18, 2003, J&G filed a complaint seeking declaratory judgment and injunctive relief against ATF. With respect to its request for declaratory judgment, J&G asserted that the demand letter exceeded the Bureau's statutory authority, constituted an arbitrary and capricious agency action, and violated due process of law. With respect to its request for injunctive relief, J&G sought to prohibit ATF from penalizing it for its refusal to comply with the demand letter and to require that ATF destroy any records that J&G had already submitted.

On January 26, 2004, ATF filed a "Motion to Dismiss or for Summary Judgment," which the district court construed as a motion for summary judgment. The district court found that the "demand letter" was an unlawful request for J&G's records because it exceeded ATF's statutory authority and enjoined ATF from seeking to enforce the letter that it issued to J&G. Despite determining that ATF lacked authority to issue the demand letter, the district court granted summary judgment to ATF on all other grounds, including that ATF's method for targeting particular firearms dealers to receive demand letters was not arbitrary and capricious.

ATF appealed to the United States Court of Appeals for the Ninth Circuit, which reversed the district court, holding that ATF had statutory authority for the "demand letter."

ARGUMENT

THE DECISION OF THE COURT OF APPEALS CONFLICTS WITH THIS COURT'S DECISIONS THAT REGULATORY STATUTES BE INTERPRETED AS A SYMMETRICAL AND COHERENT SCHEME

1) The court of appeals stated that ATF "grounds its statutory authority to issue the type of demand letter that it sent to J & G Sales in 18 U.S.C. § 923(g)(5)(A)." 473 F.3d at 1048. Section 923(g)(5)(A) provides:

> Each licensee shall, when required by letter issued by the Attorney General, and until notified to the contrary in writing by the Attorney General, submit on a form specified by the Attorney General for periods and at the times specified in such letter, all record information required to be kept by this chapter or such lesser record information as the Attorney General in such letter may specify.

While acknowledging that J&G argued that § 923(g)(5)(A) "must be read within § 923's broader statutory context" (473 F.3d at 1048), the court of appeals neglected to apply this Court's teachings on statutory construction.[2]

2) A court's objective "is to ascertain the congressional

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[2] The court of appeals relied on *Blaustein & Reich, Inc. v. Truscott*, 365 F.3d 281 (4th Cir. 2004), which held that ATF had statutory authority for the "demand letter." *Blaustein & Reich, Inc.* did not, however, address whether there were limits on § 923(g)(5)(A) when viewed in light of the statutory scheme.

intent and give effect to the legislative will." *Philbrook v. Glodgett,* 421 U.S. 707, 713 (1975). Further, it "is a fundamental canon of statutory construction that the words of a statute must be read in their context and with a view to their place in the overall statutory scheme." *Davis v. Michigan Dept. of Treasury,* 489 U.S. 803, 809 (1989). More recently, this Court has explained:

> In determining whether Congress has specifically addressed the question at issue, a reviewing court should not confine itself to examining a particular statutory provision in isolation. The meaning--or ambiguity--of certain words or phrases may only become evident when placed in context. . . . A court must therefore interpret the statute "as a symmetrical and coherent regulatory scheme," . . . and "fit, if possible, all parts into an harmonious whole . . . ."

FDA v. Brown & Williamson Tobacco Corp., 529 U.S. 120, 133 (2000)(citations omitted).

In *Mastro Plastics Corp. v. Labor Board,* 350 U.S. 270, 285 (1956), this Court rejected an interpretation of a statute which read words in isolation, as the court of appeals did here:

> If the above words are read in complete isolation from their context in the Act, such an interpretation is possible. However, "In expounding a statute, we must not be guided by a single sentence or member of a sentence, but

> look to the provisions of the whole law, and to its object and policy." (citations omitted).

350 U.S. at 285.

In *Colautti v. Franklin*, 439 U.S. 379 (1979), this Court held that it is an "elementary canon of construction that a statute should be interpreted so as not to render one part inoperative." 439 U.S. at 392. See also *United States v. Menasche*, 348 U.S. 528, 538-539 (1955): "'The cardinal principle of statutory construction is to save and not to destroy.' (citation omitted). It is our duty 'to give effect, if possible, to every clause and word of a statute' (citation omitted), rather than to emasculate an entire section, as the Government's interpretation requires." Further, "a statute ought, upon the whole, to be so construed that, if it can be prevented, no clause, sentence, or word shall be superfluous, void, or insignificant." *Duncan v. Walker*, 533 U.S. 167, 174 (2001) (internal quotation marks omitted).

Thus, in determining the scope of ATF's authority under § 923(g)(5)(A), a court must look not only to the language of § 923(g)(5)(A) itself, as the court of appeals did, but to other statutory provisions to ascertain Congress' intent and give effect to the legislative will.

3) Section 923(g)(5)(A) was enacted as part of the Firearms Owners' Protection Act ("FOPA"), P.L. 99-308, 100 Stat. 449 (1986). FOPA, however, also amended § 923(g)(1)(A)(i) to require reasonable cause and a warrant "for the purpose of inspecting or examining" licensee records; amended § 923(g)(1)(B) to authorize inspection of licensee

records "without such reasonable cause or warrant" i) in the "course of a reasonable inquiry during the course of a criminal investigation of a person or persons other than the licensee"; ii) for "ensuring compliance with the record keeping requirements of this chapter" by an annual inspection or "with respect to records relating to a firearm involved in a criminal investigation that is traced to the licensee"; and iii) to authorize inspection of licensee records when "required for determining the disposition of one or more particular firearms in the course of a bona fide criminal investigation." In 1994, Congress enacted § 923(g)(7), which requires licensees to provide information from their records when requested by ATF "as may be required for determining the disposition of 1 or more firearms in the course of a bona fide criminal investigation."

The court of appeals' construction of § 923(g)(5)(A) violates the canons of construction articulated in *Davis v. Michigan Dept. of Treasury, supra, FDA v. Brown & Williamson Tobacco Corp., supra, Mastro Plastics Corp. v. Labor Board, supra, Colautti v. Franklin, supra, United States v. Menasche, supra,* and *Duncan v. Walker, supra,* by effectively rendering a nullity the specific grants of authority established by § 923(g)(1)(A), § 923(g)(1)(B)(i), § 923(g)(1)(B)(iii), and § 923(g)(7).

Indeed, under the reasoning of the court of appeals, ATF could simply send a demand letter for records it wished to inspect or examine, and not comply with the reasonable cause and warrant requirement of § 923(g)(1)(A) or the express limitations on warrantless searches under § 923(g)(1)(B)(i) (in the "course of a reasonable inquiry during the course of a

criminal investigation of a person or persons other than the licensee") and § 923(g)(1)(B)(iii) ("determining the disposition of one or more particular firearms in the course of a bona fide criminal investigation."). Such an action would plainly be an evasion of Congress' carefully crafted scheme for ATF's access to licensee records.

The court of appeals observed that § 923(g)(1)(B) and § 923(g)(7) each "serves quite distinct purposes from the demand letter." 473 F.3d at 1050. Section 923(g)(1)(B), according to the court of appeals:

> governs when Bureau officials may physically gain entry onto an FFL's premises in order to inspect record information. When the Bureau merely sends a demand letter requesting certain limited information, no physical intrusion whatsoever occurs. This is a difference that matters.

Id.

While it is true that, when ATF sends a demand letter requesting information, no physical intrusion occurs, this is not a difference that matters. Congress' enactment of § 923(g)(1)(A) and (B) in FOPA placed limits on ATF's ability to obtain record information, as evidenced by the fact that the very purpose of the inspections authorized by § 923(g)(1)(A)

and (B) is to obtain access to records.[3] *Cf. Colonnade Corp.* v. *United States*, 397 U.S. 72 (1970), where the statute authorized searches for "any articles or objects subject to tax" (397 U.S. at 77). Accordingly, because the demand letter is used to obtain record information, the limitations on access to records enacted by Congress in § 923(g)(1)(A) and (B) are implicated in construing Congress' intent with respect to the scope of § 923(g)(5)(A) .

With respect to § 923(g)(7), the court of appeals states that "§ 923(g)(7) imposes speedy reporting requirements on FFLs in the context of criminal investigations . . . ." 473 F.3d at 1050. But the court of appeals' construction of § 923(g)(5)(A) permits § 923(g)(5)(A) to be used to obtain speedy reporting from licensees in the context of criminal investigations. Thus, the fact that § 923(g)(7) "imposes speedy reporting requirements on FFLs in the context of criminal investigations" does not establish that the reporting required by § 923(g)(7) serves a distinct purpose from the demand letter. Rather, the court of appeals' construction of § 923(g)(5)(A) shows that § 923(g)(7) does not serve a distinct purpose from the demand letter. Accordingly, the court of appeals' construction of § 923(g)(5)(A) is inconsistent with § 923(g)(7).

The court of appeals' conclusion not only permits ATF to evade the limitations on access to records enacted by

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[3] *United States v. Biswell*, 406 U.S. 311 (1972) upheld the constitutionality of the previous version of § 923(g) because inspections of federally licensed firearms dealers were "carefully limited in time, place, and scope" (406 U.S. at 315) and "specifically authorized by statute." 406 U.S. at 317. Congress was entitled, however, to place restrictions on ATF's authority to conduct inspections by withdrawing statutory authority.

Congress in § 923(g)(1)(A) and (B)(ii), but also allows ATF to circumvent the limits of § 923(g)(1)(B)(i) and (iii) by sending a demand letter for records without there being any criminal investigation. Similarly, the court of appeals' holding would allow ATF to circumvent § 923(g)(7)'s "bona fide criminal investigation" requirement and compel information to be reported within 24 hours through the demand letter provision. Accordingly, the express limitations on ATF's authority in § 923(g)(1)(A) and (B), and § 923(g)(7), must thus be construed as limitations on ATF's authority under § 923(g)(5)(A) to avoid them being rendered nullities.

4) The construction of § 923(g)(5)(A) adopted by the court of appeals is also inconsistent with § 923(g)(3)(A) (submission of reports of multiple firearms sales) and § 923(g)(4) (submission of out of business records) because, under that construction, § 923(g)(3)(A) and § 923(g)(4) are rendered superfluous and insignificant in that ATF could use the authority of § 923(g)(5)(A) to require the submission of reports of multiple firearms sales and of out of business records. That Congress deemed necessary the enactment of both § 923(g)(3)(A) and § 923(g)(4) reveals that Congress did not intend that § 923(g)(5)(A) have the broad reach ascribed to it by the court of appeals.

5) While the above makes plain that Congress intended that § 923(g)(5)(A) not be an open ended grant of authority, the uncertain interplay of the various provisions of the statutory scheme render the scheme ambiguous as to the precise limits of § 923(g)(5)(A). As noted in *Robinson v. Shell Oil Co.*, 519 U.S. 337(1997) the "plainness or ambiguity of statutory language is determined by reference to the language itself, the

specific context in which that language is used, and the broader context of the statute as a whole." 519 U.S. at 341. See also *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. at 133 ("The meaning--or ambiguity--of certain words or phrases may only become evident when placed in context"). Such lack of clarity can be resolved by resort to the legislative history.[4]

As *K Mart Corp. v. Cartier, Inc.*, 486 U.S. 281 (1988) noted of another statute:

> Even if the language of § 526 clearly covered all affiliates of foreign manufacturers, "[i]t is a `familiar rule, that a thing may be within the letter of the statute and yet not within the statute, because not within its spirit, nor within the intention of its makers.'" It is therefore appropriate to turn to our other "traditional tools of statutory construction" for clues of congressional intent. *INS v. Cardoza-Fonseca*, 480 U.S. 421, 446 (1987).

486 U.S. at 300.

Thus, a court must "look first to the statutory language and then to the legislative history if the statutory language is

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[4] Even if resort to the legislative history is not required, it may be reviewed to confirm the statutory construction. *Cf. Negonsott v. Samuels*, 507 U.S. 99, 106 (1993)("Although we think resort to secondary materials is unnecessary to decide this case, the legislative history of the Kansas Act supports our construction"); *Airports Auth. v. Citizens for Noise Abatement*, 501 U.S. 252, 267 (1991)("Although the legislative history is not necessary to our conclusion that the Board members act in their official congressional capacities, the floor debates in the House confirm our view").

unclear." *Blum v. Stenson*, 465 U.S. 886, 896 (1984).

6) The original demand letter regulation (27 C.F.R. § 178.126) was promulgated under, and became effective on the same date as, the Gun Control Act of 1968, December 16, 1968. § 105(a), P.L. 90-618, 82 Stat. 1213 (1968); 33 F.R. 18555, 18556 (Dec. 14, 1968). Harold Serr, Director of the Alcohol and Tobacco Tax Division, wrote to Senator Frank Church, on December 17, 1968:

> [U]nder no circumstances does the Alcohol and Tobacco Tax Division intend to require licensed firearms dealers to submit all records of firearms transactions to a central location. This would be in effect gun registration and the Congress clearly showed its desires in this area when gun legislation was voted on.

131 Cong. Rec. S9129 (July 9, 1985).

Serr wrote that the demand letter regulation would be used "when we become aware of violations of the law by an unscrupulous dealer." *Id.* An example would be a dealer illegally selling handguns to out-of-state residents who stated that "they could give him any name they chose." In such a situation, "we would require the dealer to submit records of his sales, not for the purpose of registration, but for the purpose of proceeding against the dealer for a criminal violation of the law." *Id.* Serr emphasized, however, that ATF had "no intention of requiring law-abiding gun dealers to report their firearms transactions to us." *Id.*

Section 103 of FOPA, 100 Stat. 454, amended § 923(g)(1)(A) to provide that licensees "shall not be required to submit to the Secretary reports . . . except as expressly required by this section." Such records "include, for instance, multiple sales reports and certain informational reports used in connection with tracing." S.Rep. 98-583, at 15. "See, e.g., proposed 18 U.S.C. 923(g)(4)and (5),[5] discussed in more detail infra." *Id.* n.32.

Subparagraph (4) would be enacted as the demand letter provision. § 103 of FOPA, 100 Stat. 455. That provision "is based on existing Treasury regulations describing activities which facilitate the Secretary's ability to trace the disposition of firearms in connection with criminal investigations."[6] S.Rep. 98-583, at 17. The Report continues:

> The purpose of Paragraph (4) is to clarify and ensure the Secretary's authority to conduct legitimate tracing activities in connection with bona fide criminal investigations. The authority granted to the Secretary under this Paragraph is intended to provide access to all

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[5] Subparagraph (5) would be enacted as § 923(g)(3), which provides that a licensee shall report to the Secretary the sale of two or more handguns in a five-day period.

[6] In 1994, Congress enacted § 923(g)(7), which created an explicit duty of a licensee to respond to a trace request, "orally or in writing, as the Attorney General may require" within 24 hours and authorized the Attorney General to make such requests by telephone. A trace request pursuant to § 923(g)(7) was, however, only for the purpose of "determining the disposition of 1 or more firearms in the course of a bona fide criminal investigation."

> information legitimately needed in sensitive criminal investigations, such as the investigation of President Reagan's attempted assassination. However, because of the breadth of the authority granted, limitations on the use of such information, which do not exist under current regulations, were included to restrict any potential for the abuse of the rights of law-abiding licensees.

Id. at 18.

The use of § 923(g)(5)(A) in relation to traces would be limited not only to "bona fide criminal investigations," but would be further confined by what would be enacted as § 926(a).[7] As the Senate report, which referred to the demand-letter provision as the "tracing provision[]" below, further explained:

> The multiple sales, out-of-business records, and tracing provisions, which, in certain respects, codify existing regulations, were included in the Committee amendment to achieve an appropriate balance between legitimate law enforcement needs and the Committee's

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[7] § 926(a) provides in part that the Attorney General may not promulgate a "rule or regulation" which would:

> require that records required to be maintained under this chapter or any portion of the contents of such records, be recorded at or transferred to a facility owned, managed, or controlled by the United States . . . .

> determination to substantially restrict the circumstances under which inspections are authorized. This, in turn, reduces the potential for unwarranted intrusions into the business affairs of law-abiding licensees. However, . . . the authority granted under 18 U.S.C. 923(g)(3), (4) and (5), as well as that contained in paragraph (1), as amended, are not to be construed to authorize the United States . . . to use the information obtained from any records or form which are required to be maintained for inspection or submission by licensees under Chapter 44 to establish any system of registration of firearms, firearms owners, or firearms transactions or dispositions.

Id. at 18.

Specifically, § 106 of FOPA, 100 Stat. 459-60, amended § 926(a) to prohibit BATF from requiring that licensee records "be recorded at or transferred to" a government facility or establishing any registration system, but allowing the authority to conduct traces "in the course of a criminal investigation." The report states that "this 'tracing' authority is codified in the Committee's amendment," obviously referring to what would be enacted as § 923(g)(5)(A). Senate Report 98-583 at 27.

Senator Orrin Hatch, floor manager of FOPA, explained of the demand letter regulation: "The Senate bill explicitly codifies regulations permitting tracing of firearms used in crimes." 132 Cong. Rec. S5351 (May 6, 1986).

In later Senate debate, Senator Hatch explained of § 926(a) that "the authority to request tracing information for dealers can never be used to establish any centralized or regional registration system for firearms or firearm owners." 131 Cong. Rec. S8691 (June 24, 1985). Senator Hatch also clarified the understanding of the 1968 demand letter regulation which FOPA would codify as follows:

> *In order to facilitate tracing of firearms used in violent crimes, licensed dealers currently are required to provide the Secretary of Treasury with information about specific weapons upon request.* Further a dealer must report multiple handgun sales to the same person which occur within 5 consecutive business days, and if the dealer is going out of business, he must send his records to the BATF rather than destroy or otherwise dispose of them. These tracing authorities are included currently in Federal regulations.

131 Cong. Rec. S8691 (June 24, 1985) (emphasis added).

Senator Hatch added that "the authority to request tracing information for dealers can never be used to establish any centralized or regional registration system for firearms or firearm owners." *Id.* Hatch stated about § 923(g)(5)(A) that "Congress had no intent to require all law-abiding gun dealers to report all their firearms transactions" to BATF. *Id.* at S9129

(July 9, 1985).[8] For the purpose of "clarifying the record information submission requirement for firearms licensees," Senator Hatch inserted into the record ATF Director Serr's explanation of the purpose of the demand letter regulation quoted above.

Not a single senator voiced a contrary view of the purpose of § 923(g)(5)(A). Thus, the canon of statutory construction that it "is the sponsors that we look to when the meaning of the statutory words is in doubt," *Schwegmann Bros. v. Calvert Corp.*, 341 U.S. 384, 394-395 (1951), applies with particular emphasis with respect to § 923(g)(5)(A).

When the bill was being considered by the House after Senate passage, Edward T. Stevenson, Deputy Assistant Secretary, Enforcement and Operations, Department of the Treasury, explained the understanding of the United States of the language which became § 923(g)(5)(A):

> Initially, the bill could be interpreted to remove the statutory authority by which the Government may require licensees to report information from required records. Based on this authority, licensees are currently required by regulations to provide information about

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[8] Senator James McClure, the chief FOPA sponsor, provided the following concise explanation: "The central compromise of the Gun Control Act of 1968 – the *sine qua non* for the entry of the Federal Government into any form of firearms regulation was this: Records concerning gun ownership would be maintained by dealers, not by the Federal Government and not by State and local governments." 131 Cong. Rec. S9163-64 (July 9, 1985).

> particular firearms transactions on request, to report multiple sales of handguns to the same person, and to turn in to the Government out-of-business records upon ceasing business. Under S. 49, as passed by the Senate, these existing reporting requirements would be preserved and now specifically required by statute.

Legislation to Modify the 1968 Gun Control Act: Hearings Before the Committee on the Judiciary, House of Representatives, 99th Cong., 1st & 2d Sess., 1139 (1986) (emphasis added).

As discussed, *supra*, the "existing reporting requirements" referred to by Deputy Assistant Secretary Stevenson were "existing Treasury regulations describing activities which facilitate the Secretary's ability to trace the disposition of firearms in connection with criminal investigations." S.Rep. 98-583, at 17. Thus, it was the clear understanding of both Congress and the executive branch prior to the enactment of § 923(g)(5)(A) that both the original regulation and the statute as enacted by FOPA were limited in scope to (1) information from dealers who were in violation of the law, and (2) information from any dealers about specific firearms dispositions necessary for bona fide criminal investigations.

Accordingly, the only reading of § 923(g)(5)(A) which does not render a nullity the limitations established by § 923(g)(1)(A) and (B), § 923(g)(3)(A), § 923(g)(4), and § 923(g)(7), and which allows all provisions to fit "'into an harmonious whole'" (*Brown & Williamson*, *supra*, 529 U.S. at

133), is to read the record submission authority in § 923(g)(5)(A) as authorizing ATF to require the submission of information needed "to conduct legitimate tracing activities in connection with bona fide criminal investigations." S.Rep. 98-583, 98th Cong., 2d Sess., at 18 (1984).[9] To construe § 923(g)(5)(A) to authorize ATF to demand records for tracing which are not in the course of a bona fide criminal investigation would violate the basic rule of statutory construction that, "[w]hen a statute limits a thing to be done in a particular mode, it includes a negative of any other mode." *Christensen v. Harris County*, 529 U.S. 576, 583 (2000). See also *Bulova Watch Co. v. United States*, 365 U.S. 753, 758 (1961)("It is familiar law that a specific statute controls over a general one"). As ATF does not, however, contend that the record information demanded is required for determining the disposition of firearms in the course of a bona fide criminal investigation, ATF exceeds its authority under § 923(g)(5)(A) in demanding the record information it demands here.

6) The reason given by the demand letter applies to the entire class of firearms licensees: "Without the information we are requesting, ATF would not be able to trace these secondhand guns because they have passed through the hands of one or more nonlicensed purchasers." This situation exits, however, because that is the way Congress wrote the law, not due to any fault of compliant licensees which received the demand letter. If that is an enforcement problem, it is for

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[9] "There was no Senate Report on Pub.L. No. 99-308. S.Rep. No. 98-583 accompanied S. 914, the substantially similar predecessor to S. 49, the Senate bill which was the basis for Pub.L. No. 99-308." *National Rifle Ass'n v. Brady*, 914 F.2d 475, 477 n.1 (4th Cir. 1990), *cert. denied* 499 U.S. 959 (1991).

Congress to solve, not ATF.

ATF, however, now seeks to "improve on" the statutory scheme devised by Congress. Indeed, it is telling that, in 1999, the Administration proposed a bill that would have required licensees "to submit" to ATF "identifying information for used firearms taken into inventory," the information now sought by the demand letter. ATF explained that this "would fill a major void in the tracing system. However, Congress has yet to act on this legislation." *Commerce in Firearms* 26 n.40. Having failed to convince Congress that it should "fill a major void in the tracing system," ATF has undertaken, in the demand letter, to fill that void itself.

ATF's efforts to fill what it refers to as a "major void in the tracing system" is similar to the situation faced by the Fourth Circuit in *NRA v. Brady*, 914 F.2d 475 (4th Cir. 1990) where ATF had argued that, without the challenged regulation, "it will be difficult for BATF inspectors to determine whether the collector properly recorded each firearm disposed of and whether such firearms were disposed of lawfully." 914 F.2d at 484-85. The court responded:

> While the Secretary may accurately depict the enforcement problems that invalidation of this requirement may create, courts are simply not at liberty to ignore the plain language of the statute. The policy arguments forwarded by the Secretary with respect to enforcement "should be directed to the Congress rather than to [the courts]."

Id. at 485, quoting *McCulloch v. Sociedad Nacional*, 372 U.S. 10, 22 (1963).

The same is true here; if there is "a major void in the tracing system," ATF should address its concern to Congress.

CONCLUSION

This Court should grant this petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit.

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June, 2007

APPENDIX

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

J & G SALES LTD,
Plaintiff-Appellee,

v.

CARL J. TRUSCOTT, Director, Bureau of Alcohol, Tobacco, Firearms and Explosives,
Defendant-Appellant.

No. 04-16976
D.C. No.
CV-03-02263-PGR
OPINION

Appeal from the United States District Court
for the District of Arizona
Paul G. Rosenblatt, District judge, Presiding

Argued and Submitted
Oct. 20, 2006 - San Francisco, California

Filed January 16, 2007

Before: Sandra Day O'Connor, Associate Justice (Ret.),* and Pamela Ann Rymer, and Sidney R. Thomas, Circuit Judges.

Opinion by Retired Justice O'Connor

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* The Honorable Sandra Day O'Connor, Associate Justice of the United States Supreme Court (Ret.) sitting by designation pursuant to 28 U.S.C. § 294(a).

COUNSEL

Peter D. Keisler, Assistant Attorney General, Paul K. Charlton, United States Attorney, Michael S. Raab and Lewis S. Yelin (argued), Civil Division, United States Department of Justice; Joel J. Roessner, Deputy Associate Chief, Peter W. Mickelson and Rebekah Holman, Office of the Chief, Bureau of Alcohol, Tobacco, Firearms & Explosives, Washington, DC, for the appellant.

Richard E. Gardiner, Fairfax, VA, for the appellee.

OPINION

O'CONNOR, Associate Justice (Ret.):

The Bureau of Alcohol, Tobacco, Firearms, and Explosives appeals from the district court's grant of summary judgment holding that the Bureau lacks authority to issue a letter requiring a small percentage of licensed firearms dealers to submit portions of their records relating to secondhand firearms. Because we find that the Bureau acted within its statutory authority under 18 U.S.C. § 923(g)(5)(A), we reverse the district court's grant of summary judgment. We affirm, however, the district court's determination that the Bureau did not act in an arbitrary and capricious fashion in deciding which dealers should receive the disputed letter.

I.

The Gun Control Act of 1968, 18 U.S.C. § 921 et seq., requires persons wishing to "engage in the business of

importing, manufacturing, or dealing in firearms" to apply for and obtain a license from the Bureau of Alcohol, Tobacco, Firearms, and Explosives.[1] 18 U.S.C. § 923(a). Successful applicants, known as federal firearms licensees ("FFLs"), must create and maintain detailed records documenting the firearms transactions that they conduct. When FFL dealers receive a firearm they must record "the date of receipt, the name and address or the name and license number of the person from whom received, the name of the manufacturer and importer (if any), the model, serial number, type, and the caliber or gauge." 27 C.F.R. § 478.125(e). After selling a firearm, FFL dealers must further record the name and address of the purchaser along with the date of sale. *See id.*

Rather than submitting all of their transaction records to the Bureau, FFLs keep their records on their own premises. This arrangement exists at least in part because the Firearm Owners' Protection Act of 1986 ("FOPA"), see 18 U.S.C. § 926(a), and a rider that has been attached to every Bureau appropriations bill since 1978, *see, e.g.*, Appropriations, 2000-Treasury, Postal Service, Executive Office of the President, and General Government, 114 Stat. 2763, 2763A-129 (2000), forbid the Bureau from establishing a national firearms registry. Despite this ban on creating a

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[1] Although the Gun Control Act initially granted firearms licensing authority to the Secretary of the Treasury, the Secretary delegated this authority to what was then called the Bureau of Alcohol, Tobacco, and Firearms. When Congress passed the Homeland Security Act of 2002, it transferred the licensing authority from the Treasury Department to the Department of Justice, which subsequently delegated the authority to the reconfigured Bureau of Alcohol, Tobacco, Firearms, and Explosives. 28 C.F.R. § 0.130(a)(1). Because any distinction between the two Bureaus is irrelevant to the disposition of this case, we will use the term "the Bureau" to refer broadly to the entity that has assumed responsibility for licensing the firearms industry. *See Blaustein & Reich, Inc. v. Buckles*, 365 F.3d 281, 283 n. 3 (4th Cir.2004).

centralized registration system, Congress has authorized the Bureau to maintain at least two sets of transaction records. First, FFLs must submit a report to the Bureau when they sell an unlicensed person two or more of certain firearms within a span of five consecutive business days ("multiple sales"). See 18 U.S.C. § 923(g)(3)(A). Second, FFLs that go out of business must submit their records to the Bureau within thirty days. See 18 U.S.C. § 923(g)(4). In addition, the Bureau is authorized to access FFL records in some instances. *See, e.g.*, 18 U.S.C. § 923(g)(1)(B)(iii) (permitting the Bureau to examine FFL records without reasonable cause or obtaining a warrant when doing so "may be required for determining the disposition of one or more particular firearms in the course of a bona fide criminal investigation").

The Bureau relies upon FFL records when it seeks to trace a firearm at the behest of a law enforcement officer. "A crime gun trace begins when a law enforcement official recovers a firearm, usually from a crime scene or from the possession of a suspect, felon or other prohibited person, and the law enforcement agency having jurisdiction of the case submits a trace request to [the Bureau's] National Tracing Center (NTC)." See Bureau of Alcohol, Tobacco, and Firearms, Department of the Treasury, *Commerce in Firearms in the United States* 19 (2000) ("*Commerce in Firearms*"). Using the distinguishing characteristics of the firearm, including its serial number, the NTC begins by searching the records of out-of-business FFLs and by searching multiple sales records. *See id.* at 20. "If these steps do not identify the first retail transaction, the NTC contacts the manufacturer or importer, and tracks the recovered crime gun through the distribution chain (wholesaler and retailer) to the retail dealer, requesting the dealer to examine his records to determine the identity of the first retail purchaser." *Id.*

This tracing system works adequately when the initial retail purchaser of a firearm retains possession of the firearm. If that first purchaser should sell or otherwise transfer the firearm, however, it is "generally impossible" to conduct a trace because "[f]ederal law does not require unlicensed sellers to preserve transfer records." *Id.* at 26. In order to trace a secondhand firearm, authorities must resort to an "investigative trace," which requires time-consuming interviews and the use of informants. *See id.* Because investigative traces are resource intensive and seldom succeed, the Bureau infrequently undertakes such measures in order to trace a secondhand firearm. *See id.* Consequently, while FFLs must maintain records documenting their secondhand firearm transactions, see 27 C.F.R. § 478.125(e), the standard trace fails to uncover this information because there is no link between the first transaction and subsequent transactions. See *Commerce in Firearms* at 26. This gap in the tracing system is important because a large percentage of the firearms sold annually are secondhand firearms.

On February 4, 2000, the Bureau published a comprehensive report that analyzed some of the data regarding trace requests on firearms. *See Commerce in Firearms* (2000). The report noted that in 1998 a small percentage of FFL dealers accounted for the majority of firearms for which traces were conducted. *See id.* at 23.[2] The report further noted that, although the average amount of time between when a firearm is initially sold and when a gun is recovered at a crime scene or when a trace is requested ("time-to-crime") is six years, many traces on firearms occurred within three years of sale or less.

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[2] *Commerce in Firearms* at 23, Table 13, Distribution of Traces among Current Dealers, 1998 (indicating that while just 1.2% of all FFL dealers had ten or more guns traced to them, those dealers accounted for 57.4% of all gun traces).

See id. at 25. "Time-to-crime of three years or less is considered an important trafficking indicator because it suggests that the firearm was rapidly diverted to the illegal market." *Id.* at 21 n. 33.

In order to combat the difficulties of tracing secondhand firearms, the Bureau decided to send demand letters seeking a limited amount of information to the approximately 450 FFL dealers who in 1999 had been linked to ten or more trace requests with a time-to-crime of three years or less. The demand letters obligated members of this select group, who comprised just 0.6% of FFL dealers, to provide the following information regarding secondhand gun acquisitions: the name of the manufacturer and/or importer; the acquisition date; the model; the caliber or gauge; and the serial number. Recipients of the demand letters were expressly directed not to provide either the name of the person from whom the secondhand firearm was acquired or to whom the firearm was transferred.

On August 4, 2003, the Bureau sent J & G Sales, Ltd. ("J & G") such a demand letter because tracing records indicated that 15 or more firearms with a time-to-crime of three years or less had been traced to J & G, an FFL dealer. Letter from the Bureau to J & G at 1 (Aug. 4, 2003). The demand letter explained the difficulties of tracing secondhand guns and suggested the fact that J & G "had a high number of traces of new crime guns with a short 'time-to-crime' may mean that [J & G is] also selling a commensurate number of secondhand guns used in crime." *Id.* The demand letter further instructed J & G to submit its report for 2002 secondhand firearms acquisitions to the NTC within thirty days, and quarterly reports thereafter until it was informed otherwise. *See id.* at 2-3.

On November 18, 2003, J & G opted against releasing the information requested in the demand letter and instead filed a complaint seeking declaratory judgment and injunctive relief against the Bureau. *See J & G Sales, Ltd. v. Domenech*, No. CV 03-2263-PCT-PGR, Order at 3 (D.Ariz., Aug. 5, 2004). With respect to its request for declaratory judgment, J & G asserted that the demand letter exceeded the Bureau's statutory authority, constituted an arbitrary and capricious agency action, and violated due process of law. *See id.* With respect to its request for injunctive relief, J & G sought to prohibit the Bureau from penalizing it for its refusal to comply with the demand letter and to require that the Bureau destroy any records that J & G had already submitted. See id. On January 26, 2004, in response to J & G's complaint, the Bureau filed a document it styled a "Motion to Dismiss or for Summary Judgment," which the district court construed as a Motion for Summary Judgment. See *id.* at 4.

The district court found that the demand letter represented an unlawful request for J & G's records because it fell beyond the scope of the Bureau's statutory authority. *See id.* at 29. Accordingly, the district court enjoined the Bureau from seeking to enforce the letter that it issued to J & G. Despite determining that the Bureau lacked authority to issue the demand letter, the district court granted summary judgment to the Bureau on all other grounds, including that the Bureau's method for targeting particular firearms dealers to receive demand letters was not arbitrary and capricious. *See id.* This appeal followed.

II.

We apply a de novo standard of review to both a district court's grant of summary judgment and questions of statutory interpretation. *See Arizona State Bd. for Charter Schools v.*

United States Dep't of Educ., 464 F.3d 1003, 1006 (9th Cir.2006). "When reviewing an agency's construction of a statute it is charged with administering, we look first to the statutory text to see whether Congress has spoken directly to the question at hand." *Contract Mgmt., Inc. v. Rumsfeld*, 434 F.3d 1145, 1146 (9th Cir.2006). If that statutory text clearly reveals Congress's intent, we stop our inquiry there because "the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress." *Chevron, U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 842-43, 104 S.Ct. 2778, 81 L.Ed.2d 694 (1984).

A.

Although this case presents a question of first impression in this circuit, this is not the first time that a federal court of appeals has assessed whether the Bureau possesses statutory authority to send demand letters to FFLs requiring them to provide specified record information. The Court of Appeals for the Fourth Circuit has twice considered-and twice upheld-the Bureau's authority to issue such letters under 18 U.S.C. § 923(g)(5)(A).

In *RSM, Inc. v. Buckles*, 254 F.3d 61 (4th Cir.2001), the Fourth Circuit considered whether the Bureau could, in response to another problem identified in the Commerce in Firearms report, issue demand letters to FFLs who failed to comply adequately with the Bureau's firearms trace requests. *See id.* at 63. These uncooperative FFLs received demand letters because they: "(1) failed to respond to a firearms trace request on at least one occasion; (2) failed to respond to a trace request within 24 hours on three or more occasions; or (3) provided incorrect information in response to a request." *See id.* Noting that just 41 FFLs (less than 0.1% of the 80,000 FFLs in the nation) had been deemed uncooperative, the Fourth

Circuit determined that, while the Bureau's statutory authority to issue demand letters is not boundless, "[n]othing in the relevant statutory framework suggests ... that letters which are narrowly-tailored to facilitate [the Bureau's] trace request authority in criminal investigations run afoul of [the Bureau's] authority under section 923(g)(5)(A) to issue appropriate requests for record information." *Id.* at 63, 67.

In *Blaustein & Reich v. Buckles*, moreover, the Fourth Circuit considered an FFL dealer's challenge to a demand letter requesting information regarding its acquisitions of secondhand firearms, a demand letter seeking substantially the same information as the one at issue here. *See* 365 F.3d 281, 283 (4th Cir.2004). Bob's Gun Shop, the FFL dealer that contested the Bureau's statutory authority in *Blaustein & Reich*, raised almost precisely the same objections to the Bureau's authority as J & G does in the instant matter. The Fourth Circuit rejected each of the arguments disputing the Bureau's authority to issue the demand letter asserted by Bob's Gun Shop. See id. at 287-90. Today, we agree with the Fourth Circuit that § 923(g)(5)(A) authorizes the Bureau to issue such demand letters.

B.

The Bureau grounds its statutory authority to issue the type of demand letter that it sent to J & G Sales in 18 U.S.C. § 923(g)(5)(A). Congress passed that provision when it amended the Gun Control Act with FOPA, part of which-both parties agree-permitted the Bureau to send demand letters to FFL dealers requiring them to submit record information, at least in certain instances. Section 923(g)(5)(A), the demand letter amendment, provides:

> Each licensee shall, when required by letter issued by the [Bureau], and until notified to the

> contrary in writing by the [Bureau], submit on a form specified by the [Bureau], for periods and at the times specified in such letter, all record information required to be kept by this chapter or such lesser record information as the [Bureau] in such letter may specify.

18 U.S.C. § 923(g)(5)(A).[3] Read in isolation, there can be no question that § 923(g)(5)(A) authorizes the Bureau to issue the disputed demand letter.

J & G challenges the Bureau's plain reading of § 923(g)(5)(A) by insisting that this demand letter provision must be read within § 923's broader statutory context. To that end, J & G marshals other statutory provisions that, it contends, effectively demonstrate that the Bureau has exceeded the scope of its statutory authority by sending J & G the demand letter at issue. We turn now to these statutory arguments.

First, J & G contends that the Bureau's understanding of § 923(g)(5)(A) cannot be reconciled with § 923(g)(1)(A), which indicates that FFLs "shall not be required to submit to the [Bureau] reports and information with respect to such records and the contents thereof, except as expressly required by this section." 18 U.S.C. § 923(g)(1)(A). It is certainly true

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[3] This amendment "essentially codified" 27 C.F.R. § 178.126(a), a 1968 regulation requiring FFLs to submit record information when the Bureau seeks it. *RSM*, 254 F.3d at 64. 27 C.F.R. § 478.126(a), which is the current incarnation of 27 C.F.R. § 178.126(a), states in relevant part: "Each licensee shall, when required by letter issued by the Director of Industry Operations, and until notified to the contrary in writing by such officer, submit ... all record information required by this subpart, or such lesser record information as the Director of Industry Operations in his letter may specify." *Id.* Apart from some minor changes in nomenclature, this regulation has remained substantially unchanged since 1968. *See RSM*, 254 F.3d at 64 n. 1.

that § 923(g)(1)(A) limits the Bureau's ability to procure information from FFLs to the express requirements of § 923, but it does not eviscerate the content of § 923(g)(5)(A). As the Fourth Circuit noted in *Blaustein & Reich*, "Section 923(g)(5)(A) contains a condition precedent. It requires an FFL to submit record information to the Bureau but only if the Bureau issues a demand letter requesting it. This condition precedent does not negate the fact that § 923(g)(5)(A) contains an express requirement that is provided for in § 923(g)(1)(A)." 365 F.3d at 287 n. 14.

After analyzing data indicating that a small number of FFL dealers accounted for a majority of firearms that were traced, the Bureau set out to remedy its inability to trace secondhand firearms by using a narrowly-tailored approach. Accordingly, the Bureau sent the demand letter at issue to a small fraction of FFLs and sought only a limited subset of information from FFLs regarding a limited subset of firearms. Whatever the boundaries of the Bureau's authority, the demand letter at issue falls safely within them. In this case, "[i]t is unnecessary ... to delineate the precise scope of [the Bureau's] authority to issue letters to FFLs." *RSM*, 254 F.3d at 67. While Congress has long sought to prohibit the Bureau from establishing a national firearms registry, the Bureau's actions here do not come close to realizing this forbidden goal. Rather, the demand letter at issue seeks a limited amount of information from FFL dealers in order to help remedy the problem posed by tracing secondhand firearms. "While we are not free to ascribe to section 923(g)(5)(A) an open-ended reach, neither are we at liberty to eliminate altogether its positive grant of authority." *Id.*

Second, explicating which provisions it contends are accounted for in § 923(g)(1)(A), J & G asserts that according § 923(g)(5)(A) the reading that the Bureau urges would serve

to nullify two other provisions of the Gun Control Act. These two provisions, J & G contends, make it apparent that the Bureau may request record information from FFLs only in the course of bona fide criminal investigations: (1) a subsection which authorizes the Bureau to "inspect or examine the inventory and records of a[n FFL] without ... reasonable cause or warrant" in particular circumstances, 18 U.S.C. § 923(g)(1)(B);[4] and (2) a subsection that requires FFLs to respond to requests from the Bureau within 24 hours, when the Bureau seeks information regarding a firearm in the course of a criminal investigation, 18 U.S.C. § 923(g)(7).[5] Congress would not have made these specific allowances, J & G asserts, if the Bureau could simply make an end-run around these requirements by issuing demand letters regarding this information pursuant to § 923(g)(5)(A).

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[4] Section 923(g)(1)(B) provides that the Bureau may inspect FFL records in the following instances without having probable cause or needing to obtain a warrant:

> (i) in the course of a reasonable inquiry during the course of a criminal investigation of a person or persons other than the licensee; (ii) for ensuring compliance with the record keeping requirements of this chapter-(I) not more than once during any 12-month period; or (II) at any time with respect to records relating to a firearm involved in a criminal investigation that is traced to the licensee; or (iii) when such inspection or examination may be required for determining the disposition of one or more particular firearms in the course of a bona fide criminal investigation.

18 U.S.C. § 923(g)(1)(B).

[5] Section 923(g)(7) provides in relevant part: "Each [FFL] shall respond immediately to, and in no event later than 24 hours after the receipt of, a request ... for information contained in the records ... as may be required for determining the disposition of 1 or more firearms in the course of a bona fide criminal investigation." 18 U.S.C. § 923(g)(7).

Each of these provisions, however, serves quite distinct purposes from the demand letter. Section 923(g)(1)(B) governs when Bureau officials may physically gain entry onto an FFL's premises in order to inspect record information. When the Bureau merely sends a demand letter requesting certain limited information, no physical intrusion whatsoever occurs. This is a difference that matters. See *RSM*, 254 F.3d at 66 ("The statutory scheme makes clear that section 923(g)(1)(B) is aimed at preventing warrantless, on-site searches of FFLs' records. In contrast, issuance of a letter under section 923(g)(5)(A) does not involve the entry of [Bureau] agents onto an FFL's premises."). Similarly, § 923(g)(7) imposes speedy reporting requirements on FFLs in the context of criminal investigations, and neither explicitly nor implicitly serves to limit the Bureau's power under § 923(g)(5)(A). *See Blaustein & Reich*, 365 F.3d at 287 n. 13 ("[Section] 923(g)(7) does not limit the Bureau's authority to issue demand issue letters like the one issued to Bob's Gun Shop."); *see also RSM*, 254 F.3d at 66 ("Section 923(g)(7) does not purport either to address or restrict [the Bureau's] section 923(g)(5)(A) authority to issue letters. Instead, it establishes the duties of FFLs when they receive a trace request."). Rather than the Bureau attempting to transform these aforementioned provisions into nullities, it is J & G who seeks to strip § 923(g)(5)(A) of its independent meaning.

Finally, J & G advances an argument involving two statutory provisions that Bob's Gun Shop does not appear to have advanced in *Blaustein & Reich*. If § 923(g)(5) is accorded the reading that the Bureau urges, J & G contends that §§ 923(g)(3)(A) and (g)(4) would be rendered superfluous. Section 923(g)(3)(A) requires FFLs to submit a report to the Bureau when it sells an unlicensed person two or more of certain firearms within a span of five consecutive business days. Section 923(g)(4) requires firearms businesses that go out

of business to submit their records to the Bureau within thirty days.

Simply because some provisions of § 923 impose specific duties upon FFLs to respond to certain requests within a specified time frame and to provide record information sua sponte does not mean that the Bureau is prohibited from seeking further FFL record information by demand letter. Nothing in the statute suggests that the Bureau's authority extends only to the statutory provisions that J & G agrees to recognize. And we decline J & G's invitation to so limit that authority.

Because we find that -- even after considering § 923(g)(5)(A) in its broader context -- the statute is clear, we need not address J & G's exhaustive discussion of 18 U.S.C. § 923's legislative history. See *Ratzlaf* v. *United States*, 510 U.S. 135, 147-148 (1994) ("[W]e do not resort to legislative history to cloud a statutory text that is clear.").

C.

Turning beyond the confines of § 923, J & G also contends that the Bureau's issuance of the demand letter here conflicts with Congress's prohibition on new rules or regulations regarding FFL records articulated in 18 U.S.C. § 926(a). That provision provides in relevant part:

> No such rule or regulation prescribed after the date of the enactment of [FOPA, May 19, 1986,] may require that records required to be maintained under this chapter or any portion of the contents of such records, be recorded at or transferred to a facility owned, managed, or controlled by the United States ..., nor that any

> system of registration of firearms, firearms owners, or firearms transactions or dispositions be established.

18 U.S.C. § 926(a). Because the Bureau had not previously issued demand letters to FFLs in precisely this fashion, J & G asserts, its action "is, in effect, a new regulation." Appellee's Br. at 33.

By the very terms of the statute, however, § 926(a) cannot be understood to limit the Bureau's authority to issue demand letters under either § 923(g)(5)(A) or 27 C.F.R. § 478.126(a). *See Blaustein & Reich*, 365 F.3d at 288. Section 926(a) has no bearing on § 923(g)(5)(A) because the former provision pertains only to "rule[s]" and "regulation[s]" and the latter is a statute, not a rule or regulation. *See id.; see also id.* at 290 ("Section 926(a) prohibits a federal agency from prescribing new rules or regulations that require FFLs to report their records."). Moreover, § 926(a) has no bearing on 27 C.F.R. § 478.126(a) because it prohibits the promulgation of rules and regulations prescribed only after May 19, 1986, and the regulation at issue dates back to 1968. *See id.* at 288. Although before 2000 the Bureau had never previously issued demand letters precisely like the one at issue here, that does not mean that the agency lacked regulatory authority to issue J & G the contested letter. Nor was the demand letter a new "rule or regulation" simply because it represented a departure from the Bureau's prior interpretation of its authority, as J & G suggests. See *Chief Probation Officers of California v. Shalala*, 118 F.3d 1327, 1334 (9th Cir.1997). Thus, § 926(a)'s provision barring new rules and regulations is plainly inapposite to the discussion at hand.

III.

Aware that this court could reverse the district court's statutory holding, J & G also urges affirmance on the ground that the Bureau's issuance of a demand letter in these particular circumstances constitutes arbitrary and capricious agency action, in violation of 5 U.S.C. § 706(2)(A). In essence, J & G contends that the demand letter at issue is a shot in the dark. We disagree.

When reviewing an agency action to determine whether it is arbitrary and capricious, our scope of review "is narrow and a court is not to substitute its judgment for that of the agency." *Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983) (internal quotation marks omitted). In this court, the review of whether an agency's action "was arbitrary or capricious is highly deferential, presuming the agency action to be valid." *Irvine Med. Ctr. v. Thompson*, 275 F.3d 823, 830-31 (9th Cir.2002) (internal quotation marks omitted). The agency must, of course, "examine the relevant data and articulate a satisfactory explanation for its action including a rational connection between the facts found and the choice made." *State Farm*, 463 U.S. at 43 (internal quotation marks omitted). While we may not remedy deficient agency actions, courts will "uphold a decision of less than ideal clarity if the agency's path may reasonably be discerned." *Id.* (internal quotation marks and citations omitted). Moreover, "[w]here the agency's line-drawing does not appear irrational and the [party challenging the agency action] has not shown that the consequences of the line-drawing are in any respect dire ... [courts] will leave that line-drawing to the agency's discretion." *Leather Indust. of Am. v. EPA*, 40 F.3d 392, 409 (D.C.Cir.1994).

J & G proposes four distinct theories contending that the Bureau's issuance of the contested demand letter constitutes arbitrary and capricious agency action. First, J & G contends

that the demand letter asserted, without any basis in fact, that "crime guns" seized from "crime scenes" had been traced to it. The crux of this contention is that the Bureau sometimes conducts traces on guns that were not in fact used in crimes. Because the records submitted by the Bureau to the district court under seal were heavily redacted, J & G suggests, the district court could not determine whether the sixteen firearms traced to J & G were actually "crime guns." But J & G's effort to dispute whether the sixteen firearms in question were in fact "crime guns" falters because that is a term of art, which the Bureau invokes to refer to any gun that is the subject of a trace request. The Bureau traces firearms at the behest of law enforcement officials, and it seems safe to assume that law enforcement officials do not generally opt to have traces conducted out of idle curiosity. Even if that assumption is proven incorrect, however, we cannot fault the agency simply for seeking a limited subset of information from FFLs that were connected to a large number of traced guns. Although the Bureau might have selected a broader term than "crime gun" to describe firearms that had been traced by law enforcement officials, mere linguistic imprecision does not render an agency's action arbitrary and capricious.

Second, J & G claims that the Bureau's threshold of firearm traces for determining which FFL dealers would receive the demand letter should have taken into account overall sales volume. Under this theory, FFL dealers that sell a large number of firearms may receive a demand letter even if a comparatively small percentage of its firearms ended up having a trace conducted. While the Bureau certainly could have considered what percentage of firearms sold ended up being traced in order to establish a threshold for issuing the demand letter, the Bureau's decision to rely instead on an absolute number of traces does not render the action arbitrary and capricious. The agency need not craft the perfect threshold

in order to survive review, but merely demonstrate that its threshold stems from reasoned decisionmaking. This, the agency has done.

Third, J & G contends that the Bureau acted impermissibly when it increased the triggering threshold of firearms traces from ten to fifteen in 2002. As a preliminary matter, it is unclear why J & G seeks to challenge the increased threshold because, with its sixteen traced guns with a time-to-crime of three years or less, J & G would have received a letter under either threshold. Moreover, as the Bureau notes, the data that the agency relied upon from the *Commerce in Firearms* report to establish the ten-trace threshold also supported the fifteen-trace threshold. See *Commerce in Firearms* at 23, Table 13, Distribution of Traces among Current Dealers, 1998. J & G has not demonstrated why fifteen traced firearms established an irrational threshold, and we can find no reason to upset the agency's decision.

Fourth, J & G asserts that the Bureau incorrectly thought that it could extrapolate from data regarding traces conducted on new firearms to traces conducted on secondhand firearms. But as the Fourth Circuit observed in *Blaustein & Reich*: "[T]he Bureau reasonably deduced that since [a] small group of dealers was the original source of a disproportionate share of the new firearms that were traced, this same group might also be the source-through illegal or legal means-of a substantial percentage of secondhand firearms that are traced." 365 F.3d at 291. We can think of no reason, and J & G has not offered one, to believe that an FFL dealer who sells a large number of new firearms that end up being traced would not similarly sell a large number of used firearms that also end up

being traced.[6]

Thus, we agree with the district court that the Bureau's issuance of the demand letter to J & G in these particular circumstances did not constitute arbitrary and capricious agency action.

IV.

For the foregoing reasons, we reverse the district court's grant of summary judgment and hold that the Bureau possessed statutory authority to issue J & G the letter demanding the specified record information regarding its secondhand firearms transactions. We affirm the district court's determination that the Bureau's issuance of a demand letter to J & G in these circumstances did not constitute arbitrary and capricious agency action.

AFFIRMED IN PART AND REVERSED IN PART.

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[6] The demand letter did provide an exemption from reporting for FFL dealers who do not sell secondhand firearms. See Letter from the Bureau to J & G at 4.

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(20)

Supreme Court, U.S.
FILED
07-29 JUN 15 2007
OFFICE OF THE CLERK

No. 07-

IN THE

Supreme Court of the United States

J&G SALES, LTD,

Petitioner

v.

MICHAEL J. SULLIVAN,
ACTING DIRECTOR
BUREAU OF ALCOHOL, TOBACCO,
FIREARMS AND EXPLOSIVES

Respondent

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

SUPPLEMENTAL APPENDIX

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Fairfax, Virginia 22030
(703) 352-7276
Counsel for Petitioner
**Counsel of Record*

TABLE OF CONTENTS

United States District Court for the District of Arizona,
Judgment dated August 5, 2004 ..... 1a

United States District Court for the District of Arizona,
Order dated August 4, 2004 ..... 3a

UNITED STATES DISTRICT COURT
DISTRICT OF ARIZONA

J & G SALES, LTD..,	)	
	)	
Plaintiff,	)	CIV 03-2263 PCT PGR
	)	
vs.	)	**JUDGMENT**
	)	
EDGAR DOMENECH,	)	
ACTING DIRECTOR,	)	
BUREAU OF ALCOHOL	)	
TOBACCO, FIREARMS	)	
AND EXPLOSIVES,	)	
	)	
Defendant.	)	

_____

_____ **Jury Verdict.** This action came before the Court for trial by jury. The issues have been tried and the jury has rendered its verdict.

__x__ **Decision by Court.** This action came for consideration before the Court. The issues have been considered and a decision has been rendered.

IT IS THEREFORE ORDERED AND ADJUDGED granting in part and denying in part Defendant's Motion for Summary Judgment. Judgment is entered in favor of Defendant with respect to Counts 2-6 of Plaintiff's Complaint.

Judgment is entered in favor of Plaintiff with respect to Count 1 of Plaintiff's Complaint that the demand letter is an unlawful request for its FFL records outside the scope of BATFE's statutory authority. IT IS FURTHER ORDERED that dft is enjoined from seeking to enforce its August 4, 2003 demand letter issued to Plaintiff.

Date: August 5, 2004

RICHARD H. WEARE
Clerk/DCE

/s/ L. Dixon
(By) Deputy Clerk
L. Dixon

cc: all counsel

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA

J & G Sales, LTD.,	)	
	)	
Plaintiff,	)	CV 03-2263 PCT PGR
	)	
vs.	)	ORDER
	)	
Edgar A. Domenech, Acting Director, Bureau of Alcohol, Tobacco, Firearms and Explosives,	)	
	)	
Defendant.	)	

Pending before the Court are Defendant's Motion for Summary Judgment (doc. 9-1) and Plaintiff's Motion to Supplement Opposition to Defendant's Motion for Summary Judgment (doc. 20- 1). The Court now rules on the motions.

I. BACKGROUND

The Gun Control Act of 1968 as amended, requires a federal firearms licensee ("FFL" or "licensee") to maintain records of gun[1] transactions as required by the Bureau of Alcohol, Tobacco, Firearms and Explosives ("BATFE"). 18

[1] The parties use firearm and gun interchangeably throughout their pleadings.

U.S.C. §§ 921-931.[2] FFL records are used by BATFE to perform its statutory tracing responsibilities. *See* § 923(g)(1)(B)(ii)(II) and § 923(g)(7); *cf.* § 926(a) (recognizing BATFE's tracing authority).

In 2000, BATFE issued a report ("BATFE 2000 Report")[3] identifying limitations in BATFE's ability to trace new guns because of uncooperative gun dealers as well as limitations in BATFE's ability to trace secondhand guns. The report noted that more than half of all new gun traces with short times-to-crime[4] could be traced to a small class of FFLs. BATFE concluded that the fact that an FFL had a high number of traces of new crime guns with short times-to-crime may mean that the FFL is also selling a commensurate number of secondhand crime guns.

Consequently, since the BATFE 2000 Report was issued, BATFE has identified FFLs with a significant number of gun traces with short times-to-crime during the preceding

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[2] Prior to November 2002, the Secretary of the Treasury was responsible for enforcing federal gun laws. The Secretary delegated the authority to the Bureau of Alcohol, Tobacco and Firearms. The Homeland Security Act of 2002, 6 U.S.C. §§ 101 and 531, transferred the enforcement responsibility to the Attorney General who, in turn, delegated his authority to the (renamed) Bureau of Alcohol, Tobacco, Firearms and Explosives. 28 C.F.R. § 0.130(a)(1).

[3] Bureau of Alcohol, Tobacco & Firearms, Department of the Treasury, *Commerce in Firearms in the United States* (2000).

[4] Time-to-crime refers to the period of time it takes for a traced gun to move from the retailer to a crime scene. The average time-to-crime is six years. BATFE considers a time-to-crime of three years or less a short time-to-crime. *See* BAFTE's alleged fact #10, infra p. 5.

year and issued a demand letter to each FFL.[5] The demand letters required each FFL to report to BATFE a portion of the FFL's records for all secondhand guns acquired during the preceding year and thereafter on a quarterly basis. Each FFL was required to provide the following partial information regarding the secondhand gun:

1. the name of the manufacturer and/or importer;

2. the acquisition date;

3. the model;

4. the caliber or gauge; and

5. the serial number.

The demand letters warned that an FFL's failure to comply may result in administrative or criminal sanctions including revocation of the FFL's federal firearms license.

During the 2002 calendar year, BATFE traced sixteen new guns with short times-to-crime to J & G Sales, Ltd. ("J &G"), an FFL. On August 4, 2003, BATFE issued a demand letter to J&G requiring it to report partial information for all secondhand guns acquired by J&G during calendar year 2002, during the first quarter of calendar year 2003, and quarterly

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[5] The letter was issued by BATFE through its National Tracing Center Division. On February 3, 2000, the Director of BATFE delegated the authority to issue demand letters pursuant to 18 U.S.C. § 923(g)(5)(A) and 27 C.F.R. § 178.126 to the Special Agent in Charge of BATFE's National Tracing Center Division.

thereafter until directed otherwise.

On November 18, 2003, J&G filed its complaint against BATFE seeking a declaratory judgment and injunction against BATFE. The thrust of J&G's claims centers on J&G's reading of 18 U.S.C. § 923 as a complete framework: J&G argues that BATFE's authority to issue demand letters to FFLs under 18 U.S.C. § 923(g)(5) must be interpreted in the context of the other statutory provisions; consequently, BATFE's demand letter authority is tempered by the limitations of subsections of § 923 and other statutes. On the other hand, BATFE reads § 923(g)(5) in isolation, essentially contending that BATFE is authorized to issue a demand letter to an FFL to obtain record information for any purpose. Tension exists because BATFE must provide gun tracing without establishing a national gun registry. *Blaustein & Reich, Inc. v. Buckles,* 220 F. Supp. 2d 535, 536 (E.D. Va. 2002) [hereinafter *Blaustein I*], *aff'd,* 365 F.3d 281 (4th Cir. 2004) [hereinafter *Blaustein II].*

J&G seeks a declaratory judgment that the demand letter (1) is an unlawful request for its FFL records outside the scope of BATFE's statutory authority, (2) is an arbitrary and capricious agency action and thus an unlawful agency action, and (3) is in violation of J&G's rights to due process of law. In addition, J&G seeks a preliminary and permanent injunction to (1) prevent BATFE from taking any adverse action against J&G for not submitting record information to BATFE as required by the demand letter and (2) require BATFE to destroy any information already submitted to BATFE by J&G.

On January 26, 2004, BATFE filed its Motion to Dismiss or for Summary Judgment. On January 28, 2004, the Court ordered that the motion would be construed as a Motion

for Summary Judgment. J&G filed its opposition to BATFE's Motion for Summary Judgment on March 5, 2004. BATFE filed its reply to J&G's opposition on March 27, 2004.

On March 16, 2004, J&G filed Plaintiff's Motion to Supplement Opposition to Defendant's Motion for Summary Judgment. BATFE filed its opposition to J&G's motion on March 25, 2004. J&G filed its reply to BATFE's opposition on April 14, 2004.

II. LEGAL STANDARDS AND ANALYSIS

A. DEFENDANT'S MOTION FOR SUMMARY JUDGMENT

The Court must grant summary judgment when: (1) no genuine issues of material fact remain; and (2) after viewing the evidence most favorably to the non-moving party, the movant is clearly entitled to prevail as a matter of law. Fed. R. Civ. P. 56; *Celotex Corp.* v. *Catrett,* 477 U.S. 14 317, 322-23 (1986); *Eisenberg* v. *Ins. CO. DIN Am.,* 815 F.2d 1285, 1288-89 (9th Cir. 1987).

The moving party bears the burden of demonstrating that it is entitled to summary judgment. *Mur-ray Mgmt. Corp. v. Founders Title Co.,* 819 P.2d 1003, 1005 (9th Cir. 1991). If the moving party makes a prima facie showing that no genuine issue of material fact exists, then the burden shifts to the opposing party to produce sufficient competent evidence to show that a triable issue of fact remains. *Ancell* v. *United Station Assocs., Inc.,* 803 P.2d 450, 452 (9th Cir. 1990).

BATFE alleges the following facts[6] in support of its motion for summary judgment:[7]

1. The BATFE 2000 report describes how BATFE traces guns using information obtained from FFLs.

2. At the request of a law enforcement agency which recovers a gun, BATFE's National Tracing Center traces a gun from its manufacturer or importer to the first retail dealer who is asked to identify the first retail purchaser.

3. FFLs are crucial to BATFE's tracing system, a fact recognized by Congress when it required FFLs to respond within 24 hours to a BATFE tracing request in the course of a bona fide criminal investigation.

4. BATFE significantly aids law enforcement agencies in their efforts to solve crimes and detect firearms trafficking patterns; however, BATFE's tracing system has limitations.

5. One limitation is FFLs which do not keep proper records or cooperate with BATFE requests. In 1999, .1 % of FFLs did not respond, were slow to respond, or provided incorrect information to BATFE trace requests. BATFE issued demand letters to these FFLs requiring that each FFL provide

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[6] The facts alleged by BATFE in this action are, in all material respects, identical to the facts alleged by BATFE in *Blaustein & Reich, Inc.* v. *Buckles*, 220 F. Supp. 2d 535, 539-542 (E.D. Va. 2002), *affd*, 365 F.3d 281 (4th Cir. 2004) (adopting BATFE's alleged facts verbatim as findings of the court under a local court rule because the FFL did not challenge any of the alleged facts).

[7] The Court has distilled and paraphrased the parties' alleged facts.

BATFE with gun acquisition and disposition records from the previous three years and monthly thereafter until advised otherwise.

6. Another limitation is the difficulty of tracing secondhand crime guns. Because FFLs are required only to maintain records of gun acquisition and disposition, BATFE's tracing system does not easily permit tracing of guns beyond the first retail purchaser. This is a problem for the law enforcement community because more than half of BATFE's gun traces involve secondhand guns.

7. Because FFLs are required to maintain acquisition records for secondhand guns, the information necessary to easily trace secondhand guns exists. However, prior to the demand letter program at issue in this case, secondhand gun traces could not be conducted by BATFE because (1) FFLs did not routinely provide secondhand gun records to BATFE and (2) the lack of a link between first and subsequent retail transactions prevented BATFE from tracking a gun to a subsequent FFL.

8. BATFE analyzed its gun tracing data to determine the best way to obtain access to FFL secondhand gun information for BATFE' s secondhand gun traces. Although BATFE's statutory authority requires any FFL to provide record information when requested by letter, BATFE used available data to narrowly focus its data collection to collect limited information from a small class of FFLs.

9. Most new guns traced by BATFE are sold by a small class of FFLs. Slightly more than 1% of FFLs were associated with ten or more gun traces in 1998. These FFLs accounted for

more than half of BATFE's guns traces.

10. This class of FFLs can be further narrowed. Time-to-crime is the time it takes for a gun to move from the FFL retailer to a crime scene. Six years is the average time-to-crime. Three years or less is a short time-to-crime and is a trafficking indicator suggesting rapid movement of the gun to the illegal gun market. By identifying FFLs with a relatively high number of traces per year with short times-to-crime, BATFE can identify FFLs which sell guns that are ultimately used in crime. Although BATFE initially identified FFLs associated with ten or more traces per year with short times-to-crime, BATFE now identifies FFLs associated with fifteen or more traces per year with short times-to-crime.

11.The fact that an FFL sells a relatively large number of guns used in crime does not necessarily indicate any wrongful action on the part of the FFL. Nonetheless, because these FFLs are likely to sell a significant number of used guns that eventually are used in crime, by requiring these FFLs to provide BATFE with secondhand gun information, BATFE will obtain the information necessary to trace secondhand guns.

12. In response to the BATFE 2000 Report findings, BATFE decided to issue demand letters to certain FFLs requiring each FFL to provide BATFE with information from the FFL's records. BATFE required uncooperative FFLs to provide a broad scope of data regarding all guns acquired and disposed of during the preceding years, including the names of persons from whom guns were acquired or to whom guns were sold. BATFE required FFLs with fifteen or more gun traces with short times-to-crime to provide BATFE, on a quarterly basis, with a limited subset of record information consisting

only of the (1) name of the manufacturer or importer, (2) serial number, (3) model, and (4) caliber or gauge of secondhand guns acquired by the FFL from nonlicensees; BATFE instructed the FFLs not to provide the names of individuals from whom the guns were acquired or to whom the guns were sold. BATFE's demand letters explained that if an FFL had a high number of new crime gun traces with short times-to-crime, the FFL may also be selling a high volume of secondhand crime guns and that BATFE is unable to trace secondhand guns without the requested information.

13. BATFE' s records indicate that J &G was identified as the first retailer seller of fifteen or more new gun traces with short times-to-crime during 2002. Therefore, BATFE issued a demand letter to J&G requesting the information listed above for secondhand guns acquired by J&G.

14. J &G filed this action instead of complying with the demand letter.

BATFE supports its alleged facts by presenting the Administrative Record relied upon by BATFE in making its decisions.

J&G presented no additional evidence to controvert BATFE's alleged facts but disputes that the Administrative Record submitted by BATFE supports some of the facts alleged by BAFTE:[8]

2. J&G alleges BATFE receives trace requests for both

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[8] See *supra* note 7.

guns used in crime and guns obtained by law enforcement agencies for reasons not related to crime.

5. J&G alleges only .048% of FFLs did not respond, were slow to respond, or provided incorrect information to BATFE trace requests.

8. J&G disputes that BATFE has the statutory authority to require FFLs to provide detailed and extensive information when requested by BATFE.

10. J&G alleges that the Administrative Record is incomplete such that no determination can be made whether guns traced by BATFE (1) are traced in the course of bona fide criminal investigations; (2) are "crime guns"; or (3) were found at "crime scenes."

11. J&G alleges that the Administrative Record lacks support for BATFE's statement that "dealers that sell significant numbers of new guns that quickly become crime guns are likely to sell a significant number of used guns that are eventually used in crime."

13. J&G disputes that the Administrative Record is sufficiently complete to conclude that BATFE traced fifteen or more crime guns with short times-to-crime to J&G.

In addition, J&G challenges several of BATFE's alleged facts as inaccurate quotations from the Administrative Record.

The bulk of J&G's disputations of BATFE's alleged facts are irrelevant *(e.g.,* fact #2) or immaterial *(e.g.,* fact #5) for purposes of determining whether BATFE is entitled to

summary judgment. Alternatively, some of J&G's disputations call for conclusions of law *(e.g.,* fact #8). Finally, J&G's contentions that BATFE did not accurately quote the Administrative Record are misplaced insofar as BATFE's statements in its alleged facts are paraphrased or generalized conclusions, not direct quotations, from the Administrative Record *(e.g.,* facts #4,6-8).

The record supports the conclusions herein when viewed in the light most favorable to *either party.*

The statutory text is "the starting point for [the Court's] analysis" *Desert Palace, Inc.* v. *Costa,* 539 U.S. 90, 98 (2003) (quoting *Connecticut Nat. Bank v. Germain,* 503 U.S. 249, 253-254 (1992)). The "judicial inquiry is complete" if "the words of the statute are unambiguous." *Id.* (quoting *Connecticut Nat. Bank v. Germain,* 503 U.S. at 254 and *Rubin v. United States,* 449 U.S. 424, 430 (1981)).

> "It is [the Court's] duty 'to give effect, if possible, to every clause and word of a statute.' " *United States v. Menasche,* 348 U.S. 528, 538-539, 75 S. Ct. 513, 99 L. Ed. 615 (1955) (quoting *Montclair* v. *Ramsdell,* 107 U.S. 147,152, 2 S. Ct. 391, 27 L. Ed. 431 (1883)); *see also Williams* v. *Taylor,* 529 U.S. 362, 404, 120 S. Ct. 1495, 146 L. Ed. 2d 389 (2000) (describing this rule as a "cardinal principle of statutory construction"); *Market Co.* v. *Hoffman,* 101 U.S. 112, 115, 25 L. Ed. 782 (1879) ("As early as in Bacon's Abridgment, sect. 2, it was said that 'a statute ought, upon the whole, to be so construed that, if it can be

> prevented, no clause, sentence, or word shall be superfluous, void, or insignificant' "). We are thus "reluctan[t] to treat statutory terms as surplusage" in any setting. *Babbitt* v. *Sweet Home Chapter, Communities for Great Ore.*, 515 U.S. 687, 698,115 S. Ct. 2407, 132 L. Ed. 2d 597 (1995); *see also Ratzlaf v. United States*, 510 U.S. 135, 140, 114 S. Ct.655, 126 L.Ed. 2d 615 (1994).

Duncan v. *Walker*, 533 U.S. 167, 174 (2001). Legislative history may not be considered if statutory text is unambiguous. *E.E.O.C. v. Luce, Forward, Hamilton & Scripps*, 345 F.3d 742, 753 (9th Cir. 2003) (citing *Desert Palace, Inc. v. Costa*, 539 U.S. at 98; *Circuit City Stores, Inc.* v. *Adams*, 532 U.S. 105,119 (2001); *Robinson v. Shell Oil Co.*, 519 U.S. 337, 340 (1997)("Our inquiry must cease if the statutory language is unambiguous and 'the statutory scheme is coherent and consistent.'" (quoting *United States v. Ron Pair Enter., Inc.*, 489 U.S. 235, 240 (1989))); *Ratzlaf v. United States*, 510 U.S. 135, 147-48 (1994) ("[W]e do not resort to legislative history to cloud a statutory text that is clear.")).

An FFL must maintain "records of importation, production, shipment, receipt, sale, or other disposition of firearms . . . as [BATFE] may by regulations prescribe." 18 U.S.C. § 923(g)(1)(A).[9] However, an FFL "shall not be required to submit to [BATFE] reports and information with respect to such records and the contents thereof, except as

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[9] 27 C.F.R. §§ 478.121-478.134 identify the specific information which FFL records must contain including information to identify the gun and the transferee.

expressly required by this section." § 923(g)(l)(A).

In addition, an FFL must submit a report to BATFE and a local law enforcement agency[10] when the FFL disposes of two or more handguns to a non-licensee within any five consecutive business days. § 923(g)(3). An FFL must report the theft or loss of a firearm to BATFE and a local law enforcement agency within forty-eight hours of the discovery of the theft or loss. § 923(g)(6). An FFL must deliver all its required records to BATFE or a local law enforcement agency if the FFL discontinues its business. § 923(g)(4).

Furthermore, BATFE is authorized to inspect and examine FFL records during business hours after obtaining a warrant from a magistrate judge if BATFE has reasonable cause to believe a violation of the chapter has occurred. § 923(g)(1)(A). Alternatively, BATFE is authorized to inspect and examine FFL records without reasonable cause or a warrant:

(i) in the course of a reasonable inquiry during the course of a criminal investigation of a person or persons other than the licensee;

(ii) for ensuring compliance with the record keeping requirements of this chapter-

(I) not more than once during any 12-month period; or

(II) at any time with respect to records relating to a firearm involved in a criminal investigation that is traced to the licensee; or

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[10] The local law enforcement agency must destroy the report no more than 20 days after it is received.

(iii) when such inspection or examination may be required for determining the disposition of one or more particular firearms in the course of a bona fide criminal investigation.

§ 923 (g)(1)(B). In addition:

> Each licensee shall respond immediately to, and in no event later than 24 hours after the receipt of, a request by [BATFE] for information contained in the records required to be kept by this chapter as may be required for determining the disposition of 1 or more firearms in the course of a bona fide criminal investigation.

§ 923(g)(7).[11] Finally:

> Each licensee shall, when required by letter issued by [BATFE], and until notified to the contrary in writing by [BATFE], submit on a form specified by [BATFE], for periods and at the times specified in such letter, all record information required to be kept by this chapter or such lesser record information as [BATFE]

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[11] *See also* 27 C.F.R. § 478.25a:

> Each licensee shall respond immediately to, and in no event later than 24 hours after the receipt of, a request by a[ ] [BATFE] officer at the National Tracing Center for information contained in the records required to be kept by this part for determining the disposition of one or more firearms in the course of a bona fide criminal investigation.

in such letter may specify.

§ 923(g)(5)(a).[12]

Moreover, BATFE is authorized to promulgate rules and regulations to fulfill its responsibilities except that:

> No such rule or regulation prescribed after [May 19, 1986[13]] may require that records required to be maintained under this chapter or any portion of the contents of such records, be recorded at or transferred to a facility owned, managed, or controlled by the United States or any State or any political subdivision thereof, nor that any system of registration of firearms, firearms owners, or firearms transactions or dispositions be established. Nothing in this section expands or restricts [BATFE]'s authority to inquire into the disposition of any firearm in the course of a criminal

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[12] *See also* 27 C.F.R. § 478.126(a) (originally promulgated in 1968 and previously codified at 27 C.F.R. § 178.126(a):

> Each licensee shall, when required by letter issued by the Director of Industry Operations, and until notified to the contrary in writing by such officer, submit on Form 4483, Report of Firearms Transactions, for the periods and at the times specified in the letter issued by the Director of Industry Operations, all record information required by this subpart, or such lesser record information as the Director of Industry Operations in his letter may specify.

[13] The statute reads: "the date of the enactment of the Firearms Owners' Protection Act" which was May 19, 1986.

investigation.

§ 926(a). Since 1978, funds appropriated for BATFE have included this prohibition:

> [N]o funds appropriated herein shall be available for salaries or administrative expenses in connection with consolidating or centralizing, within the Department of the Treasury, the records, or any portion thereof, of acquisition and disposition of firearms maintained by Federal firearms licensees.

Pub. L. No. 106-554, 114 Stat. 2763 (2000).

The Court is aware of only two other cases in which the issues relevant to J&G's claims have been discussed. In 2000, BATFE issued a demand letter to an FFL under a demand letter program which targeted uncooperative FFLs.[14] The FFL challenged the demand letter as exceeding BATFE's statutory authority. After trial before the court, the court held that the demand letter issued to the FFL violated § 926(a) and granted a declaratory judgment in favor of the FFL; the court enjoined BATFE from seeking to enforce its demand letter. *RSM, Inc.* v. *Buckles*, 94 F. Supp. 2d 692 (D. Md. 2000) [hereinafter *RSM I*], *rev'd*, 254 F.3d 61 (4th Cir. 2001) [hereinafter *RSM II*]. On appeal, the Court of Appeals for the Fourth Circuit reversed the trial court's judgment, vacated the injunction, and held that the demand letter issued to the FFL was within the "grant of positive statutory authority" of § 923(g)(5) such that the

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[14] *See* BATFE's alleged fact #5, *supra* p. 5.

demand letter did not violate other statutory provisions. *RSM II* at 69.

Also in 2000, an FFL received a demand letter from BATFE essentially identical to the demand letter received by J&G.[15] The FFL challenged the demand letter in federal court alleging the same claims as J&G except for violation of due process. On motion by BATFE, the court granted summary judgment in favor of BATFE on all counts. *Blaustein I.* On appeal, the Court of Appeals for the Fourth Circuit affirmed the summary judgment. *Blaustein II* at 281.

1. Unlawful demand for records not expressly required by law and not for a bona fide criminal investigation (Count I)

J&G claims that BATFE's demand letter to J&G is an unlawful records request because the demand letter was not for the purpose of a bona fide criminal investigation. J&G argues that BATFE may request FFL records only for purposes of a bona fide criminal investigation as authorized by §§ 923(g)(l)(B) and (g)(7). J&G argues that any other records request by BATFE violates § 923(g)(1)(A) as a records request that is not "expressly required by this section."

BATFE claims that the demand letter was issued pursuant to § 923(g)(5) and 27 C.F.R. § 478.126. BATFE argues that the demand letter does not violate § 923(g)(1)(A) because the demand letter was issued pursuant to § 923(g)(5),

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[15] At the time the FFL received the demand letter, BATFE issued demand letters to each FFL associated with ten or more firearms traced to the FFL with short times-to-crime during a calendar year. BATFE records indicated that ten crime guns were traced to this FFL during 1999.

which permits BATFE to issue a demand letter to any FFL for any record information for any purpose, and thus a records request expressly authorized by § 923. BATFE further argues that § 923(g)(5) should be read in isolation because its language is unambiguous; therefore, any other statutory provision is inapplicable as a restriction on BATFE's authority to issue demand letters for FFL records. BATFE interprets § 923(g)(7) and 27 C.F.R. § 478.25a as setting forth an FFL's duty to respond to certain types of BATFE requests (requests in the course of a bona fide criminal investigation), arguing that neither provision is a limitation on BATFE's demand letter authority. Therefore, BATFE asserts that its demand letter is a lawful records request and it is entitled to summary judgment.

J&G counters that § 923(g)(5) cannot be read in isolation but must be interpreted in the context of the statutory framework. J&G argues that when read in conjunction with § 923(g)(1)(A) and § 923(g)(7), the demand letter authority provided for in § 923(g)(5) is not unlimited: if § 923(g)(5) authorizes BATFE to issue demand letters for record information for any reason, then the express limitations of § 923(g)(1)(A) and § 923(g)(7) on BATFE's authorization to access FFL records would be nullified.[16] J&G argues that, because BATFE is not requesting records in the course of a bona fide criminal investigation, BATFE's demand letter is an unlawful records request.[17] Thus, J&G claims that BATFE's

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[16] J&G also argues that § 926(a) limits BATFE's § 923(g)(5) demand letter authority. *See infra* note 24.

[17] J&G also argues that legislative history demonstrates that BATFE's statutory demand letter authority was intended as a tool to force uncooperative FFLs to comply with BATFE records requests in the course of bona fide criminal investigations. J&G further argues that BATFE's

demand letter authority may be used only to access the records of uncooperative FFLs in the course of bona fide criminal investigations. Therefore, J&G argues that BATFE should not be permitted to request J&G' s records by demand letter because J&G has previously complied with BATFE's records requests. Accordingly, J&G argues that BATFE is not entitled to summary judgment.

Turning to the text of the statute, if § 923(g)(5) provided BATFE with limitless authorization to issue a demand letter to any FFL for any record information for any purpose, then other provisions within § 923 and other statutory provisions would be "void," "insignificant," or "surplusage":

> [I]t is . . . clear that section 923(g)(5)(A) is not a limitless delegation of authority to [BATFE] to request record information. Section 923(g)(5)(A) does not explicitly state the purposes for which the Secretary may issue letters. Other provisions of the statute, however, make clear that section 923(g)(5)(A) cannot be construed in an open-ended fashion. For instance, section 923(g)(1)(A) provides that FFLs "shall not be required to submit to the Secretary reports and information with respect to such records and the contents thereof, *except as expressly required by this section."* 18 U.S.C. § 923(g)(1)(A)(emphasis added).

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administrative history demonstrates that BATFE has historically issued demand letters only to uncooperative FFLs. However compelling, the unambiguous language of § 923 precludes the Court from considering legislative history. *See* discussion *supra* pp. 7-8.

> Section 923(g)(1)(A)' s express limitation on the Secretary's authority would be nullified if section 923(g)(5)(A) were interpreted to permit the Secretary to issue demand letters for any purpose. . . . Congress clearly did not intend such a result.

RSM II at 67 (emphasis in original); *accord Blaustein I* at 542.

Indeed, the *RSM II* court expressly refused to "delineate the precise scope of BATF[E]'s authority to issue [demand] letters to FFLs" and explicitly stated that its "holding [was] a limited one." *RSM II* at 67. The court then held that the challenged demand letter was "narrowly-tailored" to facilitate BATFE's statutory gun tracing responsibility and did not run afoul of the statutory framework because it was issued to a small number of FFLs who routinely failed to comply with BATFE trace requests in the course of criminal investigations and each FFL' s reporting obligations would terminate when the FFL ceased to hamstring BATFE in carrying out its statutory gun tracing functions. *Id.*

Neither of the *Blaustein* courts held that the challenged demand letter was "narrowly tailored" and thus permissible under the rationale of *RSM II.*[18] The *Blaustein II* court held

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[18] Both *Blaustein* courts noted that the challenged demand letter sought less information from the FFLs than the demand letter approved in *RSM II* but ignored the fact that the challenged demand letter was issued to a substantially greater number of FFLs (forty-one FFLs in *RSM II* compared with over 1000 FFLs in *Blaustein II)* and did not provide for automatic termination of the reporting requirements when BATFE determined that the FFL complied with the terms of the demand letter. *See Blaustein II* at 289 n. 17; *Blaustein I* at 545.

that § 923(g)(1)(A) only protects against reporting requirements not expressly authorized by § 923; thus, because § 923(g)(5) "expressly requires an FFL to produce record information when [BATFE] issues a demand letter," then § 923(g)(5) is an express requirement within the meaning of § 923(g)(1)(A). *Blaustein II* at 287-288. The court held, therefore, that § 923(g)(5) did not restrict BATFE to "issuing demand letters [only] in connection with a criminal investigation or to noncompliant FFLs." *Id.* However, the *Blaustein II* court simply did not address whether § 923(g)(1)(A) limited the demand letter authority of § 923(g)(5).[19] Therefore, because the court did not address this issue, *Blaustein II* provides little help for the purpose of construing § 923(g)(5) in the context of § 923.

The *Blaustein I* court construed § 923(g)(7) as merely "obligating FFLs to respond quickly to certain types of [BATFE] requests." *Blaustein I* at 543. The court held that § 923(g)(7) "in no way limits the types of requests that [BATFE] can levy on FFLs" under § 923(g)(5) and, therefore, "bears no relation to [BATFE's] power to issue demand letters." *Id.* (relying on *RSM II* at 66); *accord Blaustein II* at 287 n. 13. The *Blaustein I* court is correct that § 923(g)(7) establishes an FFL's duty to respond to BATFE when BATFE requests records in the course of a bona fide criminal investigation. § 923(g)(7) ("Each licensee shall respond immediately to . . . a request by the Attorney General for information . . . ."). Likewise, §

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[19] The parties did not dispute that BATFE was implicitly authorized to issue demand letters under § 923(g)(5). Instead, the parties disputed whether BATFE could issue demand letters for any purposes, as urged by BATFE, or whether other statutory provisions limited the demand letter authority, as urged by the FFL. The *Blaustein II* court's conclusion that § 923(g)(5) contains a condition precedent is a non sequitur.

923(g)(5) establishes an FFL's duty to respond to BATFE demand letters. § 923(g)(5)(A) ("Each licensee shall, when required by letter . . . , submit. . . record information . . . ."). [20] Just as § 923(g)(7) does not address the scope of BATFE's authority to issue demand letters, neither does § 923(g)(1)(A) expressly address the scope of BATFE' s authority to issue demand letters. However, although these provisions proscribe duties of an FFL, these provisions must be construed so that "no clause, sentence or word [is] superfluous, void, or insignificant." *Market Co. v. Hoffman,* 101 U.S. at 115. As recognized by the *RSM II* court, to hold that these provisions cannot limit § 923(g)(5) because they do not explicitly address BATFE's demand letter authority contravenes the statutory framework established by Congress.[21]

Indeed, the individual provisions of § 923 can be harmonized so that no clause, sentence, or word is superfluous, void, insignificant or surplusage. In short, the demand letter authority of § 923(g)(5) may be exercised by BATFE for any purpose authorized by § 923 but it cannot be extended to authorize demand letters for purposes prohibited by § 923. BATFE's demand letter authority may best be illustrated by a continuum.

At one end, BATFE is clearly prohibited from issuing demand letters to obtain records protected by the reasonable

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[20] Moreover, other provisions of § 923 also establish duties of FFLs. *E.g.*, § 923 (g)(1)(A) ("Each. . . licensed dealer shall maintain . . . records of . . . disposition of firearms. . . ."); § 923(g)(6) ("Each licensee shall report the theft or loss of a firearm from the licensee's inventory or collection. . . .").

[21] See discussion *supra* p. 12.

cause and warrant requirements of § 923(g)(1)(A); to construe § 923(g)(1)(A) otherwise would render the reasonable cause and warrant requirements superfluous. In addition, BATFE is prohibited from issuing demand letters for record information from FFLs "except as expressly required by [§ 923]." § 923(g)(1)(A).

At the other end of the continuum, § 923 expressly authorizes BATFE to issue demand letters to obtain record information which FFLs must report without a request by BATFE, *i.e.*, records pertaining to:

1. the disposition of two or more handguns to a non-licensee during any five consecutive business days under § 923(g)(3);

2. discontinuation of an FFL business under § 923(g)(4);

3. an FFL's lost or stolen gun under § 923(g)(6); or

4. FFL records requested by BATFE in the course of a bona fide criminal investigation under § 923(g)(7).

In addition, § 923(g)(1)(B)(i)-(iii) authorizes BATFE to inspect or examine an FFL's records:

1. in the course of a reasonable inquiry during the course of a criminal investigation of a person or persons other than the FFL;

2. to ensure compliance with FFL record keeping requirements; or

3. in the course of a bona fide criminal investigation. Whether the access circumstances authorized by § 923(g)(1)(B) are "express[] require[ments]" within the meaning of§ 923(g)(1)(A)'s prohibition is debatable. To be sure, § 923(g)(1)(A) forbids BATFE from requiring an FFL to report record information to BATFE unless expressly authorized by § 923; § 923(g)(1)(B) does not "expressly require" an FFL to submit its records to BATFE. On the other hand, § 923(g)(1)(B) expressly authorizes BATFE to access an FFL's records in certain circumstances; § 923(g)(5) could be construed as authorizing BATFE's access by demand letter inasmuch as § 923(g)(1)(B) does not identify the means by which BATFE obtains access to the records.

There are no other provisions within § 923 that either require an *FFL to report*[22] record information to BATFE or that permit *BATFE to inspect*[23] an FFL's records.[24]

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[22] *E.g.*, § 923(g)(1)(A) *("[D]ealers [FFLs]* shall not be required *to submit* to [BATFE] reports and information with respect to such records and the contents thereof, except as expressly required by this section." (emphasis added)).

[23] *E.g.*, § 923(g)(1)(A) *("[BATFE] may,* upon demonstrating [reasonable] cause before a Federal magistrate judge and securing . . . a warrant[,] . . . enter during business hours the premises . . . of any . . . licensed dealer . . . for the purpose of *inspecting or examining* . . . any records or documents required to be kept by . . . [the] licensed dealer. . . ." (emphasis added).

[24] Because § 923(g)(5) and § 926 were enacted contemporaneously, the statutory provisions must be read together. Although § 926(a) "does not directly foreclose [BATFE's] authority to issue the [demand] letter[,] . . . the statute does not grant [BATFE] an unbounded delegation of authority to request record information." *RSM II* at 66.

[S]ection 926(a) . . . clearly demonstrates Congress'

In this case, BATFE does not contend that it issued the demand letter to J&G as a result of J&G's disposition of two or more handguns within five consecutive business days, J&G discontinuing business, the theft or loss of a J&G gun, or to ensure J&G's compliance with FFL record keeping requirements. Therefore, the only statutorily authorized justifications for BATFE's demand letter must be either (1) a records request in the course of a reasonable inquiry during the course of a criminal investigation of a person or persons other than the FFL pursuant to § 923(g)(1)(B) or (2) in the course of a bona fide criminal investigation pursuant to § 923(g)(7) or § 923(g)(1)(B)(iii).

The evidence presented does not raise a material question of fact regarding whether the demand letter BATFE was issued to J&G in the course of a reasonable inquiry during the course of a criminal investigation of a person or persons other than the J&G or in the course of a bona fide criminal investigation. The demand letter states:

> The fact that you [referring to the FFL] had a

> concern about any attempt by [BATFE] to establish a national firearms registry. Section 926(a) would be rendered meaningless if [BATFE] could issue limitless demand letters under section 923(g)(5)(A) in a backdoor effort to avoid section 926(a)'s protections for law-abiding firearms owners. Congress clearly did not intend such a result.

RSM 11 at 67; *accord Blaustein I* at 542. Therefore, § 926(a) and § 923(g)(1)(A) are corollaries that limit BATFE's demand letter authority under § 923(g)(5): BATFE may only require an FFL to report its records as expressly authorized in § 923 and BATFE may not use any portion of the reported records to establish a national firearms registry.

> high number of traces of new crime guns with a short "time-to-crime" may mean that you are also selling a commensurate number of secondhand guns used in crime. [BATFE]'s National Tracing Center (NTC) usually only has information on a firearm's original retail sale, which is typically not as useful to law enforcement as the information on any subsequent sales. Absent information on subsequent sales, [BATFE] is not able to trace secondhand guns beyond the first retail purchaser and therefore cannot provide adequate investigative leads to police. Accordingly, this letter requires you to report certain information to the NTC about firearms obtained from non-licensees. This will allow us to better assist law enforcement.[25]

BATFE explicitly acknowledges that it sought to require J&G to provide record information so that BATFE could "better assist law enforcement" in its mission to provide adequate investigative leads in response to law enforcement gun trace requests. BATFE does not claim that the demand letter was issued in the course of a reasonable inquiry during the course of a criminal investigation of a person or persons other than the

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[25] In addition, the Administrative Record states BATFE intends to provide information obtained from demand letters to gun manufacturers and importers to "enable [them] to screen distribution of their firearms and discover for themselves whether any particular model of firearm they sell is frequently used in crime." Clearly BATFE is not authorized by § 923(g)(5) to issue demand letters for the purpose of collecting FFL record information for dissemination to gun manufacturer or importers.

J&G or in the course of a bona fide criminal investigation.[26] Notably absent from the record and the pleadings is any mention of a specific criminal investigation justifying BATFE's records request by demand letter.[27]

One could infer that BATFE intends to use the records requested from J&G in the course of future secondhand gun trace requests associated with criminal investigations. However, to allow BATFE to require FFL records for use in future criminal investigations would render insignificant §

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[26] Similarly, the *Blaustein II* court noted that BATFE "concedes that it is not seeking the information demanded in its letter in connection with a particular criminal investigation." *Blaustein II* at 287 n. 11.

[27] J &G devotes considerable effort to arguing the meaning of "crime gun" and "crime scene" in an effort to demonstrate that the Administrative Record is incomplete and does not allow determination of whether new gun traces associated with J&G during 2002 were conducted in the course of bona fide criminal investigations. J&G argues that if guns that were not "crime guns" from "crime scenes" were traced to J&G then those guns were not traced to J&G in the course of bona fide criminal investigations, and, therefore, BATFE's demand for its records is unlawful. The essential key to whether a gun is lawfully traced in the course of a criminal investigation is whether a law enforcement agency is conducting a criminal investigation, not whether the gun was used in the commission of a crime. Furthermore, whether guns traced to J&G were "crime guns" as defined by J&G is irrelevant because BATFE has failed to assert that the records requested by its demand letter were requested in the course of a criminal investigation. Moreover, although the Administrative Record conclusively uses the term "crime guns" when referring to gun traces without defining the term *(e.g.*, "firearms used in crime") the Administrative Record implicitly acknowledges that BATFE traces guns which are recovered by a law enforcement agency for purposes other than criminal investigations *(e.g.*, "A crime gun trace begins when a law enforcement official recovers a firearm, *usually* from a crime scene or from the possession of a suspect, felon or other prohibited person, and the law enforcement agency. . . submits a trace request to [BATFE]." (emphasis added)).

923's statutory text "in the course of" and "bona fide." *See, e.g., Duncan v. Walker,* 533 U.S. at 174. "In the course of" and "bona fide" must require more than a potential criminal investigation which may or may not be initiated in the future; thus, a BATFE records request must be tied to an actual criminal investigation.

BATFE's demand letter does not request J&G' s records in the course of a reasonable inquiry during the course of a criminal investigation of a person or persons other than the FFL or in the course of a bona fide criminal investigation. Therefore, because the demand letter is a request for FFL records which is not expressly required by § 923, the demand letter is an unlawful request for records. Consequently, BATFE is not entitled to summary judgment with respect to J&G's first count. Conversely, J&G is entitled to judgment as a matter of law. *See, e.g., Portsmouth Square Inc. v. Shareholders Protective Committee,* 770 F.2d 866, 869 (9th Cir. 1985); *Cool Fuel, Inc. v. Connett,* 685 F.2d 309, 311 (9th Cir. 1982).

2. Violation of New Rule Prohibition of Transfer of Records to Federal Facility and Any System of Registration (Counts 2-3)

J&G claims that BATFE's demand letter to J&G is an unlawful records request because the demand letter is a new rule which violates § 926. J&G argues that the demand letter is tantamount to a new rule because it is a novel interpretation of 27 C.F.R. § 478.126. J&G argues that, because this new rule requires J&G to transfer its FFL records to BATFE, it establishes a secondhand gun registry in violation of § 926.

BATFE claims that the demand letter was issued

pursuant to § 923(g)(5) and 27 C.F.R. § 478.126. BATFE argues that, because the § 926 prohibitions apply only to rules or regulations issued after the date of enactment of § 926,[28] the prohibitions cannot apply to BATFE's demand letter to J&G. BATFE further argues that the demand letter is not a new rule because it immediately affects a particular recipient rather than prospectively affecting a broad class of individuals. Alternatively, BATFE argues that if the demand letter is a new rule, then the demand letter does not establish a firearm registration system because it requests only a limited set of information from a limited number of FFLs. Therefore, BATFE asserts that its demand letter is a lawful records request and it is entitled to summary judgment.

J&G counters that BATFE's new rule is not the demand letter but the significant revision of BATFE's interpretation of its demand letter authority. J&G argues that neither BATFE nor Congress ever interpreted BATFE's demand letter authority to permit BATFE to issue demand letters to cooperative FFLs for the broad scope of secondhand gun information requested by BATFE. J&G argues that by interpreting BATFE's demand authority to permit it to issue demand letters to compliant FFLs for any purpose *(i.e.*, not limited to uncooperative FFLS in the course of bona fide criminal investigations), BATFE significantly revised its prior interpretation of its demand letter authority. Thus J&G argues that BATFE's revision of its interpretation of its demand letter authority is, in effect, a new rule promulgated by BATFE in 2000 in circumvention of § 926(b)' s notice and comment requirements and thus requires J&G to transfer a portion of its records to the national BATFE

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[28] May 19, 1986.

office which will transfer the records to the local or regional BATFE office, which are facilities owned, managed, or controlled by the United States, in violation of § 926(a). Therefore, J&G argues that BATFE is not entitled to summary judgment.

By its plain language, the demand letter requires J&G to transfer a portion of its records to BATFE. BATFE intends to record the contents of those records at a government facility. Therefore, if the demand letter was issued pursuant to a *"rule or regulation* prescribed *after* the date of enactment of [§ 926]," then the demand letter would be prohibited by the unambiguous text of § 926. § 926(a) (emphasis added); *see RSM I* at 696. However, if the demand letter was issued under the authority of § 923(g)(5), then the demand letter cannot violate § 926 because § 923(g)(5) is neither a rule nor regulation.[29] *RSM II* at 66; *Blaustein II* at 288; *Blaustein I* at 543-544. Likewise, if the demand letter was issued under the authority of 27 C.F.R. § 478.126, the demand letter cannot violate § 926 because 27 C.F.R. § 478.126 is a regulation promulgated *before* enactment of § 926.

J&G contends that the demand letter is "a new agency policy [which] represents a significant departure from long-established and consistent practice that substantially affects the regulated industry" and, thus, "the new policy is a new substantive rule." However, nothing in the record presented by the parties supports the conclusion that BATFE had established a definitive and conclusive interpretation of its demand letter

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[29] In addition, § 923(g)(5) codified 27 C.F.R. § 478.126 and was enacted contemporaneously with § 926; therefore, § 923(g)(5) was not promulgated *after* § 926.

authority.[30] Therefore, the demand letter cannot represent a new substantive rule.[31]

Because nothing in the record supports the conclusion that the demand letter was issued to a rule or regulation promulgated by BATFE after May 19, 1986, the demand letter is not an unlawful request for records in violation of § 926(a) and BATFE is entitled to summary judgment with respect to J&G's second and third counts.

3. Violation on Appropriations Rider Prohibition of Consolidation of Records (Count 4)

J &G claims that BATFE' s demand letter is an unlawful records request because the demand letter requests records for the purpose of consolidating and centralizing secondhand gun records in violation of a BATFE appropriations rider, Pub. L. No. 106-554, 114 Stat. 2763 (2000), which prohibits BATFE from consolidating or centralizing FFL records to establish a national firearm registry.

BATFE claims that the demand letter was issued pursuant to BATFE' s statutory authority to permit BATFE to fulfill its tracing responsibilities. BATFE argues that the appropriations rider should not be construed to prohibit collection of records which would render the FFL record

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[30] While the legislative and administrative history J&G presents may be compelling, the unambiguous text of § 926 precludes its consideration. *See* discussion *supra* pp. 7-8.

[31] However, *cf supra* note 24.

reporting requirements of § 923 ineffective; the appropriations rider should instead be construed as prohibiting BATFE only from collecting all FFL records, not a portion of FFL records. BATFE further argues that the appropriations rider cannot be construed to prohibit BATFE from collecting record information from FFLs under its tracing responsibility. BATFE argues that the legislative history of the appropriations rider is irrelevant because § 923(g)(5)(A) is unambiguous and was enacted after Congress adopted the appropriations rider. Therefore, BATFE asserts that its demand letter is a lawful records request.

J&G counters that the appropriations rider allows BATFE to consolidate or centralize only those FFL records which are incidentally necessary to BATFE's statutory functions. J&G argues that demand letters to cooperative FFLs are unnecessary for BATFE to fulfill its tracing responsibilities because these FFLs already report required records. Thus, J&G argues that, because J&G has never been uncooperative with BATFE's tracing requests, the demand letter is unlawful and BATFE is not entitled to summary judgment.

The appropriations rider prohibits BATFE from expending any funds for "consolidating or centralizing, within [BATFE], the records, or any portion thereof, of acquisition or disposition of firearms maintained by Federal firearms licensees," Pub. L. No.106-554, 114 Stat. 2763 (2000).[12] "The

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[12] J&G offers legislative history to demonstrate that the appropriations rider was enacted by Congress in 1978 in response to (1) a regulation proposed by BATFE which would have required all FFLs to quarterly report their records of gun dispositions without disclosing the identity of nonlicensed transferees and (2) BATFE's argument that the statutory demand letter authority could be used to require FFLs to report

plain meaning of consolidating or centralizing does not prohibit the mere collection of some limited information. Both consolidating and centralizing connote a large-scale enterprise relating to a substantial amount of information." *Blaustein II* at 289; *accord RSM II* at 68. Therefore, the appropriations rider cannot prohibit BA TFE from consolidating or centralizing some FFL records. *See Blaustein II* at 289 ("Taken to its logical end, [the FFL's] argument would require us to strike down a demand letter requiring just one FFL to report to [BATFE] 'any portion' of record information as to one firearm. Although we would not hesitate to make such a ruling if we interpreted the plain language of the rider and the [Gun Control Act of 1968] to require it, we disagree with [the FFL's] reading of the rider.") Indeed, Congress expressly requires BATFE to collect certain FFL records as well as authorizes BATFE to collect other FFL records. *E.g.*, §§ 923(g)(3), 923(g)(4), 923(g)(6), and § 923(g)(7). Because the appropriations rider merely prohibits the *unauthorized* collection or consolidation of FFL records, the appropriations rider cannot prohibit BATFE from consolidating or centralizing FFL records which must be reported to BATFE or which BATFE is authorized to access.

The plain language of the appropriations rider does not support J&G's conclusion that BATFE is prohibited from collecting or consolidating an FFL's records if the FFL has cooperated with BATFE. Although the demand letter to J&G was not lawfully issued to J&G in the course of a bona fide

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partial record information so long as the identity of unlicensed transferees was not included. However compelling, the unambiguous language of the appropriations rider precludes the Court from considering legislative history. *See* discussion *supra* pp. 7-8.

criminal investigation,[11] the appropriations rider does not eliminate or invalidate BATFE's statutory authority to issue demand letters to an FFL inasmuch as BATFE is statutorily authorized to issue demand letters regardless of whether the FFL has cooperated with BATFE or not. *See Tenn. Valley Auth.* v. *Hill*, 437 U.S. 153, 189-190 (1978)(stating "repeals by implication are not favored" and "the only permissible justification for a repeal by implication is when the earlier and later statutes are irreconcilable"); *Firebaugh Canal Co.* v. *United States*, 203 F.3d 568, 575 (9th Cir. 2000) (holding that appropriations acts acted annually for thirty years conditioned, but did not repeal, related congressional action). Therefore, BATFE is entitled to summary judgment with respect to J&G's fourth count.

4. Arbitrary and Capricious Agency Action (Count 5)

J&G claims that BATFE's demand letter is arbitrary and capricious because the letter:

1. has no basis for alleging that "crime guns" seized from "crime scenes" were traced to J&G;

2. was based on fifteen gun traces per year to J&G without considering J&G's sales volume;

3. was based on fifteen gun traces per year to a particular FFL whereas previous demands were based on ten gun traces per year; or

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[11] *See* discussion *supra* pp. 11-18.

4. was based on the unsupported proposition that fifteen traces per year of new guns to a particular FFL is indicative of a high sales volume of used guns by that FFL.

Therefore, J&G argues that, because the demand letter has no basis in law and requires records which have no rational relationship to a bona fide criminal investigation, the demand letter is an arbitrary and capricious agency action by BATFE.

BATFE argues that its decision to issue the demand letter is amply supported by the Administrative Record. BATFE argues that, because the BATFE 2000 Report identified limitations in BATFE' s tracing system as well as a small percentage of FFLs that were responsible for over half of new gun traces with short times-to-crime, BATFE determined that FFLs with more than fifteen new gun traces with short times-to-crime could provide record information concerning secondhand gun transactions. BATFE argues that the partial record information obtained from these FFLs would partially resolve the limitations of BATFE's tracing system. BA TFE claims it traced sixteen new guns with short times-to-crime to J&G in 2000. BATFE asserts that the demand letter is reasonably based on the Administrative Record available to BATFE and is neither arbitrary or capricious. Thus, BATFE argues it is entitled to summary judgment.

J&G counters that the Administrative Record which BATFE relied upon was incomplete because the Administrative Record does not:

1. include sufficient information regarding gun traces associated with J&G which identify the law enforcement agencies requesting the traces or whether the traces were

conducted for bona fide criminal investigations. Therefore, the record does not allow the determination of whether "crime guns" were traced to J&G.[34] J&G argues that requiring it to provide FFL records unrelated to bona fide criminal investigations violates § 923(g)(7).

2. consider an FFL's sales volume in relation to the number of traces to the FFL. J&G argues that BATFE has publicly acknowledged that high traces may reflect nothing more than high sales volume.

3. identify the reason BATFE changed the threshold often traces per year to fifteen traces per year for purposes of determining which FFLs should received demand letters. J&G argues that the Administrative Record includes no information to justify changing the threshold.

4. include any facts providing a basis for BATFE's proposition that an FFL with a high number of new gun traces with short times-to-crime is likely to have a high volume of secondhand gun sales. J&G argues that the Administrative Record includes no information to justify this proposition.

J&G argues that, because the Administrative Record is incomplete, BATFE's demand letter is arbitrary and capricious and BATFE is not entitled to summary judgment.

When determining whether an agency's action is arbitrary and capricious under the appropriate APA standard of

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[34] *See supra* note 27.

review under 5 U.S.C. § 706,[35] the Court reviews the Administrative Record "already in existence, not some new record made initially in the reviewing court." *Fla. Power & Light Co. v. Lorion,* 470 U.S. 729, 743-744 (1985); *Camp v. Pitts,* 411 U.S. 138, 142 (1973).

> If the record before the agency does not support the agency action, if the agency has not considered all relevant factors, or if the reviewing court simply cannot evaluate the challenged agency action on the basis of the

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[35] 5 U.S.C. § 706 (2000):

To the extent necessary to decision and when presented, the reviewing court shall decide all relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning or applicability of the terms of an agency action. The reviewing court shall-

(1) compel agency action unlawfully withheld or unreasonably delayed; and

(2) hold unlawful and set aside agency action, findings, and conclusions found to be-

(A) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law;

(B) contrary to constitutional right, power, privilege, or immunity;

(C) in excess of statutory jurisdiction, authority, or limitations, or short of statutory right;

(D) without observance of procedure required by law;

(E) unsupported by substantial evidence in a case subject to sections 556 and 557 of this title or otherwise reviewed on the record of an agency hearing provided by statute; or

(F) unwarranted by the facts to the extent that the facts are subject to trial de novo by the reviewing court.

In making the foregoing determinations, the court shall review the whole record or those parts of it cited by a party, and due account shall be taken of the rule of prejudicial error.

> record before it, the proper course, except in rare circumstances, is to remand to the agency for additional investigation or explanation. The reviewing court is not generally empowered to conduct a de novo inquiry into the matter being reviewed and to reach its own conclusions based on such an inquiry.

Fla. Power & Light Co., 470 U.S. at 743-744.

J&G argues that the demand letter is an agency action which is arbitrary and capricious. BATFE does not argue that the arbitrary and capricious standard should not be applied to review of the demand letter.[36]

> To determine whether an agency violated the arbitrary and capricious standard, [the] court must determine whether the agency articulated a rational connection between the facts found and the choice made. The court is not empowered to substitute its judgment for that of the agency. As long as the agency decision was based on a consideration of relevant factors and there is no clear error of judgment, the reviewing court may not overturn the agency's action as arbitrary and capricious. The basis for the decision, however, must come from the

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[36] 5 U.S.C. § 706(2)(A). J&G argues in part that the demand letter is arbitrary and capricious because BATFE exceeded its statutory authority to issue demand letters. Because BATFE did in fact exceed its statutory authority, *see* discussion *supra* pp. 11-18, J&G may have asserted a claim under 5 U.S.C. § 706(2)(C).

> agency. The reviewing court may not substitute reasons for agency action that are not in the record. . . .
>
> Judicial review is meaningless, however, unless [the court] carefully review[s] the record to ensure that agency decisions are founded on a reasoned evaluation of the relevant factors. Accordingly, [the court] must not rubber-stamp administrative decisions that [it] deem[s] inconsistent with a statutory mandate . . . .

Ariz. Cattle Growers' Ass'n v. U.S. Fish & Wildlife Service, 273 F.3d 1229, 1236 (9th Cir. 2001)(quotations and citations omitted).

The Administrative Record makes clear that the BATFE 2000 Report identified a class of FFLs associated with a majority of gun traces with short times-to-crime. The Administrative Record also demonstrates that BATFE expressly acknowledged that this class of FFLs may be engaging solely in lawful activities. In addition, the Administrative Record shows that BATFE reasonably concluded that, because this class of FFLs provides the majority of information for new gun traces, this same class might also be a significant source of information regarding secondhand gun traces.

Regardless of whether BATFE traced a particular number of guns to an FLL during a particular time period or considered an FFL's sales volume, BATFE is statutorily

authorized - within the statutory limits[37] - to issue a demand letter to any FFL regardless of how many new guns BATFE traced to the FFL within a time period. Therefore, BATFE's decision to issue a demand letter to J&G cannot be considered an arbitrary and capricious agency action. *Accord Blaustein I* at 546 (demand letter construed as a "sound use of statutory authority conferred on the agency" because the facts were "well-supported in the Administrative Record").

Furthermore, J&G presented no evidence to conclude that BATFE did not consider an FFL's sales volume in relation to the number of new gun traces associated with the FFL. However, even if it were assumed that BATFE did not, J&G has presented no evidence to suggest that BATFE's conclusion was clearly erroneous or not supported by the Administrative Record, even if its conclusion might ultimately be incorrect, a point acknowledged by BATFE in the Administrative Record. *Accord Blaustein II* at 291-293 ("Although [BATFE's] assumption might ultimately be wrong, [BATFE] did not act arbitrarily or capriciously . . . ."). Moreover, BATFE's decision to increase the threshold for determining which FFLs would be issued demand letters from ten to fifteen gun traces per year further limited the scope of its demand letter program demonstrates that BATFE considered the factors relevant to its decision to appropriately tailor its demand letter 16 program.[38]

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[37] *See* discussion *supra* pp. 11-18.

[38] J&G fails to explain its objection to the heightened threshold. This is most likely because BATFE would have issued a demand letter to J&G under either threshold. Regardless, the Administrative Record, particularly Table 14 of the BATFE 2000 Report, provides ample justification for either threshold.

Therefore, BATFE is entitled to summary judgment with respect to J&G's fifth count.

5. Denial of Due Process (Count 6)

J&G claims that BATFE denied J&G's right to due process under the Fifth Amendment of the U.S. Constitution because the demand letter seeks to deprive J&G of its property interest in its records. J&G claims that the demand letter requires J&G to report its records without providing J&G notice of or the opportunity to challenge BATFE' s allegation that more than fifteen crime guns were traced to J&G during 2002.

BATFE argues that J&G has no property interest in FFL records it is statutorily required to maintain; therefore, J&G's lack of a claim of entitlement to the records precludes its due process claim. BATFE further argues that J&G is prohibited from asserting a due process claim because BATFE is entitled to FFL records in some circumstances. Finally, BATFE argues that even if J&G were entitled to assert a due process claim, due process is not lacking because (1) BATFE has imposed no sanction on J&G, (2) J&G is entitled to hearing and notice before BATFE imposes a sanction, and (3) the demand letter provides J&G with additional notice that failure to comply with the demand letter may result in sanctions imposed by BATFE. Therefore, BATFE argues it is entitled to summary judgment.

J&G counters that it has a property interest in its FFL records because (1) BATFE may obtain the records only under

the limited circumstances provided by § 923(g)(1)(A) and (B)[39] or (2) J&G creates and maintain its records using its own labor at its own expense. J&G further argues whether BATFE has imposed sanctions on J&G is immaterial because J&G would be deprived of its property interest when it provides records to BATFE. Therefore, J&G argues that BATFE is not entitled to summary judgment.

"No person shall be deprived of life, liberty, or property, without due process of law . . . ." U.S. Const. amend. V. A claim of denial of due process must include deprivation of a constitutionally protected liberty or property interest. *Wright v. Rive/and,* 219 F.3d 905, 913 (9th Cir. 2000). A property interest exists only where there is "a legitimate claim of entitlement" to the property. *Board of Regents of State Colleges v. Roth,* 408 U.S. 564, 577 (1972) ("[A] person clearly must have more than an abstract need or desire for it. He must have more than a unilateral expectation of it."). "Property interests . . . are created and their dimensions are defined by existing rules or understandings that stem from an independent source . . . ." *Id.*

The fact that J&G maintains its records with its labor at its expense is irrelevant to the question of whether J&G has a recognizable property interest in its FFL records because J&G has a statutory duty to maintain its FFL records. The express purpose of statutorily requiring J&G to maintain its FFL records is to provide BATFE with access to those records as

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[39] J&G also claims that § 923(g)(1)(D) recognizes that BATFE is entitled to seize records only if the records are material evidence of a violation of law. However, § 923(g)(1)(D) applies only to licensed collectors, not FFLs.

authorized by statute. Therefore, J&G's claim that it has a property interest in its FFL records because it expended its efforts and finances to maintain the records is inapposite. *Cf United States v. Biswell,* 406 U.S. 311 (1972) (holding that BATFE's statutorily authorized warrantless search of an FFL's business and records and the seizure of unlawful guns did not violate the FFL's "justifiable expectations of privacy" under the Fourth Amendment). In addition, J &G acknowledges that § 923 entitles BATFE to J&G's FFL records under specified circumstances. Thus, J&G has presented no evidence to demonstrated that it has a legitimate claim of entitlement to its FFL records. Consequently, in the absence of a legitimate claim of entitlement, J&G has failed to show that it has a recognizable property interest in its FFL records. Therefore, BA TFE is entitled to judgment as a matter of law with respect to J&G's sixth count.

B. MOTION TO SUPPLEMENT J&G'S OPPOSITION

J&G seeks to supplement its opposition to BATFE's Motion for Summary Judgment with a declaration made by a former BATFE special agent in connection with several consolidated actions filed in the California Superior Court.

The Court may permit a party to supplement a pleading by "setting forth transactions or occurrences or events which have happened since the date of the pleading sought to be supplemented," provided that the supplement is given with "reasonable notice and upon such terms as are just." Fed. R. Civ. P. 15(d).

The declaration submitted by J&G cannot be considered by the Court when construing the statutes at issue

in this case and would unfairly prejudice BATFE because it is an extra-record submission of alleged expert testimony. Moreover, the declaration was made for purposes of litigation other than this case. Furthermore, the declaration is not a "transaction[] or occurrence[] or event[] which [has] happened since the date of the pleading sought to be supplemented" because the declaration was made on April 8, 2003, and not since J&G filed its opposition to BATFE's Motion for Summary Judgment on March 5, 2004. *See* Fed. R. Civ. P. 15(d).

IT IS ORDERED GRANTING IN PART AND DENYING IN PART Defendant's Motion for Summary Judgment (doc. 9-1). Judgment is entered in favor of Defendant with respect to Counts 2-6 of Plaintiffs Complaint.

IT IS ORDERED that judgment is entered in favor of Plaintiff with respect to Count 1 of Plaintiff's Complaint that the demand letter is an unlawful request for its FFL records outside the scope of BATFE's statutory authority. IT IS FURTHER ORDERED that Defendant is enjoined from seeking to enforce its August 4, 2003 demand letter issued to Plaintiff.

IT IS ORDERED DENYING Plaintiffs Motion to Supplement Opposition to Defendant's Motion for Summary Judgment (doc. 20-1).

DATED this 4th day of August, 2004.

/s/
Paul G. Rosenblatt
United States District Judge